United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1578

75-7600

United States Court of Appeals

FOR THE SECOND CIRCUIT

B p/s

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Is it unlawful price-fixing under Section 1 of the Sherman Act for an industry-wide group of otherwise competing sellers to agree to have a common-sales-agency market their products at prices fixed by the agency?

The district court answered that question in the negative on the ground that the combination does not "compel" buyers to accept the common-sales agency's fixed price because

(a) a decree (entered 35 years ago) made the common-sales agency's right to sell the product non-exclusive, and a further decree (entered 26 years ago) enjoined the agency from interfering with sales, if any, made by seller-members of the combination directly to buyers;

(b) although, during the last 35 years, no member has in fact sold directly to any buyer (in the relevant market), it is physically possible for buyers to overcome the barriers to direct dealing; and

(c) it has not been shown that members would boycott buyers who stopped dealing with the common-sales agency.

2. If the combination described in the first stated issue is not unlawful unless the combination "compels" buyers' acceptance of the fixed price, is the requisite "compulsion" established by the fact that any attempt by a buyer to surmount the barriers to direct dealing is a course of conduct that threatens the buyer with appreciable competitive disadvantage and loss?

The district court did not expressly answer that question. While a number of the findings of fact made by the court presuppose the existence of such disadvantage and loss, in the court's view the combination could not be held to be fixing prices so long as direct dealing was a "viable" possibility.

3. If "compulsion" is an element of price-fixing (as held by the district court), and if it involves more than the threat of competitive disadvantage and loss to a buyer who attempts to surmount the barriers to direct dealing (as the district court also held), was it clearly erroneous for the district court to find that the combination does not "compel" buyers to accept the agency's fixed price, particularly in the light of admissions by the members of the combination that it would be wholly impractical for the buyer to surmount such barriers?

The district court made the finding referred to, but failed to consider the admissions which refute it.

4. On the facts set forth above, is the combination guilty of monopolization under Section 2 of the Sherman Act, where (a) the members of the combination are copyright proprietors, (b) the "product" marketed by that common-sales agency to television networks (the buyers) is a blanket license to the entire pool of its members' copyrighted musical compositions under which the network pays a fixed dollar fee or percentage of its income, (c) any single television network would suffer severe injury if it could not use such music, and (d) the barriers to direct licensing have been sufficient for 35 years to preclude any network from attempting to fill its music requirements by that means?

The district court answered that question in the negative.

5. Are the members of such a combination misusing the copyrights in that pool?

The district court answered that question in the negative.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-7600

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF THE CASE

This is an appeal by CBS Inc.* pursuant to 28 U. S. C. § 1292 (a)(1) from an order dated and entered September 22, 1975, dismissing the complaint after trial and thereby denying injunctive and related declaratory relief against defendants' antitrust violations. The order was

*Since the institution of this suit, plaintiff's corporate name has been changed to "CBS Inc."

rendered by Hon. Morris E. Lasker, with an opinion reported at 400 F. Supp. 737 (S. D. N. Y. 1975), reprinted in the joint appendix at JA 584.*

A. Nature of the Case.

The action was commenced December 31, 1969, against the American Society of Composers, Authors and Publishers ("ASCAP"), its president, certain named members of ASCAP and the class of all other members of ASCAP; and against Broadcast Music Inc. ("BMI"), certain named affiliates of BMI and the class of all other BMI affiliates. The complaint seeks an injunction under Section 16 of the Clayton Act, 15 U. S. C. § 26, against defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and a declaration of copyright misuse under the Declaratory Judgment Act, 28 U. S. C. § §2201 and 2202.

The principal Section 1 claim asserted is that the members and affiliates of ASCAP and BMI (virtually all music publishing corporations and writers of music in the United States) fix the prices, through the instrumentalities of those organizations, at which the nondramatic performance

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*Portions of the record on appeal in this action appear in the Joint Appendix and are cited as indicated below:

Volume No.	Type of Document	Cited As
1-2	Pleadings, briefs, affidavits, and opinions	"JA"
3-16	Trial transcript	"Tr."
17-19	Depositions	"D"
20-24	Court Exhibits ("CX"), Plaintiff's Exhibits ("PX" or "3MPX"), ASCAP Exhibits ("AX"), BMI Exhibits ("BX")	"E"

References to portions of the record not appearing in the Joint Appendix are cited to the record on appeal.

rights of copyrighted music are licensed to the CBS Television Network* and other users.

Thus, the complaint avers that each such group, comprising many thousands of otherwise competing publishing companies and writers, has granted to its respective organization the right to license the members' music at prices and terms fixed by the organization's Board; and that each such Board licenses the copyright pools so assembled to broadcaster users, including CBS, on a blanket basis—*i.e.,* a license under which the broadcaster receives the right to use any, some or all of the music in the organization's pool at an annual fee expressed either as a fixed percentage of the broadcaster's income or a flat dollar amount.**

The complaint refers to the 1941 and 1950 ASCAP consent decrees in *United States* v. *ASCAP* (Civ. No. 13-95, S. D. N. Y.) which, respectively, made ASCAP's right to license nonexclusive (E 127, para. IV(A)) and enjoined ASCAP from "interfering with the right of any member to issue to a user nonexclusive licenses for rights of public performance" (E 127-28, para. IV(B)). The complaint further avers that, in the absence of judicial relief, CBS's termination of its ASCAP blanket license and its attempt to fill its music performance rights requirements by means of direct licensing from ASCAP members (referred to

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*The designation "CBS" will be used generally throughout the brief to refer to the television network business of CBS Inc., unless the context otherwise indicates.

**While licensing at prices fixed by a common-licensing-agency Board is independently actionable as we will show in Point I, *infra,* licensing on a blanket (rather than a use-by-use) basis does impose additional restraints. One significant effect is to preclude the licensee from directly licensing music performance rights from copyright proprietors. For once the licensee pays ASCAP (or BMI) for the right to use any, some or all music in the pool during the license term, to pay a copyright proprietor as well for the right to use a composition in that pool would mean paying twice for the same music.

below as a "bypass" of ASCAP) would place it at a competitive disadvantage vis-a-vis other television networks.*

CBS seeks in this suit an order either (1) enjoining defendants from continuing to fix prices in the licensing of television networks, or (2) directing ASCAP and BMI to license CBS on a per-use basis,** and certain related injunctive and declaratory relief.

During 1970, ASCAP, BMI and other named defendants served answers generally denying the allegations of the complaint*** and asserting a variety of defenses and counterclaims which are not involved on this appeal.

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*As is discussed in Point I, *infra,* neither that averment nor the members' historically unexercised right of direct licensing (referred to below as the "retained right") are material to the price-fixing offense; they relate to an additional charge (tying) which was made below, and, as discussed in Point IV, *infra,* to the monopolization offense.

It should also be noted that the present barriers to direct licensing, while now preclusive as a practical matter, are nevertheless artificial and quite removable by decree (*See* Point II.B., *infra*).

**Since relief is not an issue on this appeal, and in order to conserve space, we refer to the lower court's description of the per-use system, 400 F. Supp. 747 at n. 7, JA 594.

***The BMI defendants did, however, admit that

> ". . . the business of BMI and ASCAP of licensing non-dramatic public performances for profit of copyrighted musical compositions are businesses in interstate commerce and that such businesses affect interstate commerce in the distribution of television network programs and the sale of broadcast time" (JA 64-65, para. 3)

—and that

> ". . . it is essential to plaintiff, in order to enable it to compete with other television networks, that it have the right to use many, if not all, musical compositions in the BMI repertory and that *any attempt by plaintiff to acquire such a large body of rights from the individual affiliates of BMI would be wholly impracticable* in the light of the fact that BMI has thousands of affiliates owning copyrights to hundreds of thousands of musical compositions, that, in many cases, multiple parties, including individuals, companies, trusts or estates, own interests in, or have claims with respect to, performing rights of single copyrights and that such affiliates and parties are scattered throughout the world." (JA 68-69, para. 15) (Emphasis added.)

B. Prior Proceedings Relevant to the Appeal.

On September 13, 1972, the district court sustained the class action allegations of the complaint under Rule 23, Fed. R. Civ. P. On January 20, 1972, the court denied ASCAP's motion for summary judgment (337 F. Supp. 394), holding that there were material issues of fact to be tried with respect to whether ASCAP's activities, "which would otherwise be illegal *per se*" (*id.* at 400), could be justified on the ground that they were essential in order to permit the market (for the licensing of performance rights to television networks) to function. In that connection, the court noted the Solicitor General's *amicus* position in *K-91, Inc. v. Gershwin Publishing Corp.,* 372 F. 2d 1 (9th Cir. 1967), *cert. denied,* 389 U. S. 1045 (1968) (a claim asserted by radio stations against ASCAP members), that such a market-functioning necessity was the basis for the regulatory system imposed by the 1950 ASCAP consent decree (as distinguished from an injunction dismantling the ASCAP system); and the court stated:

> ". . . if CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*i.e.,* permit competition to occur, and still enable the market to function], it would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary.' " * 337 F. Supp. at 400.

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*At trial, defendants conceded that there was no market-functioning necessity for the blanket licensing system (JA 364-65, 389; Nathan Tr. 4041-42; Cramer Tr. 4308-12; Fagan D 112-13, 423-24). It was necessary for defendants to make that concession for otherwise they could not contend that it was feasible for CBS to fill its music requirements by direct licensing. Indeed, by arguing the feasibility of such a bypass of ASCAP and BMI, they affirmatively urged that there was no market-functioning necessity for either ASCAP or BMI to continue licensing television networks at all (*ibid*).

By order dated June 12, 1972, the court below directed that the issues as to defendants' liability be tried separately from, and prior to, issues concerning the nature and extent of the relief to be granted herein (JA 594).* The court further directed that the question of the threat of loss or damage under Section 16 of the Clayton Act be deferred to the conclusion of the trial on liability issues, at which time the court would determine whether that issue could be resolved as a matter of law or, on the other hand, presented factual questions requiring discovery and the offer of proof. Finally, the court stayed all proceedings relating to ASCAP's counterclaims and its fourth through seventh affirmative defenses, pending the conclusion of the separate trial on the issues of defendants' liability.

On its direct case at trial, CBS called the following witnesses: Donald Sipes (Vice President—Business Affairs and Planning, CBS), Robert Wright, Edward Duke Vincent and George Sunga ("on-line" producers of various television programs and "specials"), Albert Berman (Managing Director, The Harry Fox Agency, Inc.), Marion Mingle (the Fox employee in charge of the licensing of movie rights), Burton Lane (former President of the American Guild of Authors and Composers ("AGAC")), Allen Arrow (attorney for the Minnesota Mining & Manufacturing Co. ("3M")), Eugene Goodman (officer and part owner of Jewel Music Publishing Co.), Leon Kellman (former attorney for AGAC), Franklin Fisher (Professor of Economics, M. I. T.), Walter Dean (Executive Vice President, CBS Records Division), Marion Preston (Vice President, J. Walter Thompson Company), Raymond Southworth (Professor of Mathematics and Director of

*In then defining the liability issues, the court set forth, in addition to the issue of justification specified in the summary judgment opinion, the question of "[w]hether defendants' conduct constitutes an actionable restraint of trade and compels the plaintiff as alleged in the complaint" (*ibid*).

Computer Center, College of William and Mary), Irwin Segelstein (Vice President, Program Administration, CBS), Emil Poklitar (head of the music clearance section of the CBS Business Affairs Department) and Irwin Kaplan (Vice President, Programming Methods, Inc., a division of General Telephone & Electronics). CBS also read from the depositions of Leon Brettler (Executive Vice President, Shapiro, Bernstein & Co., Inc.; ASCAP officer and Board member of ASCAP, NMPA and The Harry Fox Agency, Inc.), Salvatore Chiantia (President, MCA Music; Vice President and Board member of ASCAP; President of NMPA and Board member of NMPA and The Harry Fox Agency, Inc.) and Jerry Vogel (President, Jerry Vogel Music Co., Inc.).

On its case, ASCAP called Paul Marks (ASCAP's Director of Operations), Salvatore Chiantia, Alan Shulman (Vice President, Belwin-Mills Publishing Corp.; Board member of ASCAP, NMPA and The Harry Fox Agency, Inc.), Michael Dann (former Vice President—Programming, CBS; now Vice President, Children's Television Workshop), John Green (a composer and AGAC Council member), Aaron Copland (writer member of the ASCAP Board), Arnold Broido (Vice President, Theodore Presser Co.; ASCAP Board member), Herman Finkelstein (ASCAP General Counsel) and Robert Nathan (President, Robert R. Nathan Associates, Inc., economic consultants). ASCAP also read from the depositions of Dr. Frank Stanton (Vice Chairman of the Board, CBS) and Messrs. Brettler, Chiantia and Vogel.

BMI called Edward Cramer (its President), Paul Rosenthal (Manager, Logging and Clearance Department, BMI) and Peter O. Steiner (Professor of Economics, University of Michigan).

On rebuttal, CBS called Fred Silverman (Vice President—Programming, CBS) and recalled Professor Fisher.

C. Disposition in the Court Below.

On the authority of the single-seller tying decisions, the court below held in its final opinion that a nationwide combination of sellers (ASCAP or BMI), who market their product through a common-sales-agency device, could not be found to have engaged in price-fixing, in the light of the sellers' "retained right" to deal directly at "negotiated price[s] for each license," unless it could be shown that they "compelled" their customers to accept the common-sales-agency fixed price (400 F. Supp. at 781, JA 628).

The court stated that it could find such "compulsion" to exist in this case only if CBS could prove that filling its music performance rights requirements by direct licensing (the so-called "bypass" of ASCAP and BMI) was "not a viable method," in the sense that (a) publishers and writers would boycott CBS in the event it canceled its ASCAP and BMI blanket licenses, or (b) the transactional problems of direct licensing (given the present lack of direct-licensing facilities) were not surmountable in the absence of judicial relief. The court found that CBS had not proven either proposition, and indicated that CBS would be unable to do so unless and until it attempted a bypass in lieu of accepting the common-sales-agency price and "failed" in some measurable degree (400 F. Supp. at 749, 754, 780, JA 596, 601, 627).

The opinion below did not discuss the impact of a continuing common-sales-agency price on any such direct licensing prices (which, as discussed below, is precisely the sort of economic effect presumed in other Section 1 litigation and, in this case, was also proven by defendants' admissions, including those of ASCAP's own economic expert witness). As to the additional effect that would be exerted on any direct licensing prices by the publishers' and writers' conceded antagonism to dealing outside of the cartel (another effect presumed in other

cases and established here by substantial and uncontroverted proof), the opinion is likewise silent.

The court did make findings of fact which presuppose that a bypass attempt by CBS would cause it competitive disadvantage (*see* Point II.B.2., *infra*); but the court attached no legal significance to that fact.

As to the Section 2 claim, the court below held that the possibility of networks' directly licensing their requirements created a single market encompassing all copyrighted music (albeit a market in which no network or other user has ever dealt) and that no defendant or group of defendants had monopolized that market (400 F. Supp. at 782-83, JA 629-30).

STATEMENT OF FACTS

A. CBS.

CBS Inc. is a New York corporation engaged in the business, among others, of operating the CBS Television Network which transmits television programs to five television stations owned by CBS Inc. (located in New York, Los Angeles, Chicago, Philadelphia and St. Louis) and, pursuant to affiliation agreements, to approximately 190 independently owned and operated television stations located in various parts of the United States (400 F. Supp. at 742, JA 589; E 3-4 (para. 2), 12).

CBS obtains broadcast rights to programs primarily from program "packagers" (*i.e.,* independent television production companies). Additionally, CBS itself produces two daytime serials, a number of television "specials" (principally of the musical variety type), as well as news, public affairs, religious and sports programs (E 3-4 (para. 2), 12; Sipes Tr. 18-19). CBS sells to advertisers the rights to have their commercial announcements broadcast in association with particular network programs by those of CBS's owned stations and CBS network-affiliated sta-

tions that choose to broadcast those programs (400 F. Supp. at 742, JA 589; E 8 (para. 25), 12).

Agreements between packagers and CBS normally stipulate a price at which the packager will produce each program in a series and furnish it to CBS for original network use, and lower prices at which CBS may repeat such network uses. Pursuant to those agreements, packagers furnish all rights necessary for network uses, except the nondramatic performance rights to the music used on the programs. Such music performance rights are obtained by CBS from ASCAP and BMI. [400 F. Supp. at 742-43, JA 589-90; E 6, para. 12; Sipes Tr. 19, 22, 24; Wright Tr. 403-04; Vincent Tr. 581-83; Sunga Tr. 737-38]

B. ASCAP and Its Relationship to CBS.

ASCAP is an unincorporated association with its principal office in New York, N. Y. Its membership includes some 6,000 music publishing companies and approximately 16,000 writers of musical compositions. Since its creation in 1914, ASCAP has been engaged in the business of licensing the nondramatic performance rights to the copyrighted musical compositions owned by its members. ASCAP also discharges the functions, on behalf of its members, of policing unlicensed uses of its members' copyrighted music and instituting actions for copyright infringement against unlicensed users. [400 F. Supp. at 741-42; JA 588-89; E 4 (para. 3), 20, 69, 444-45; AX 234]

The basic rules governing the operation of ASCAP are set forth in its Articles of Association, the Amended Final Judgment entered in 1950 in *United States* v. *ASCAP,* the Order of January 7, 1960, as amended to date in *United States* v. *ASCAP,* the ASCAP Regulations (promulgated from time to time by the Board of Directors) and its membership agreements (400 F. Supp. at 743-44,

JA 590-91). It is administered by a Board of Directors, consisting of 12 writer members (elected by a vote of the writer membership), including the president of ASCAP (elected by the Board of Directors) who is traditionally a writer, and representatives of 12 publisher members (elected by the publisher membership). Its principal managerial personnel include Stanley Adams, President, Paul Marks, Director of Operations, Herman Finkelstein, General Counsel and Dr. Paul Fagan, Chief Economist. [E 19, 24, 36, 41, 68, 124, 139; PX's 400, 411; Marks Tr. 2400, 2413-14, 2416-17; Finkelstein Tr. 3577]

As a condition of membership, each writer or publishing company must sign a standard writer or publisher membership agreement. Under that agreement, the member authorizes ASCAP to license all of his (its) musical compositions,* then existing or thereafter created, on the terms and conditions decided upon by the ASCAP Board. [400 F. Supp. at 742, JA 589; E 19, 68; Finkelstein Tr. 3593, 3806-07]

The total number of copyrighted musical compositions owned by current members, and therefore the number of compositions in the ASCAP pool, exceeds 3 million (400 F. Supp. at 742, JA 589; PX 29).

Additionally, ASCAP has entered into affiliation agreements with foreign licensing organizations in 34 countries and Puerto Rico. Under those agreements, ASCAP is authorized to license in the United States all musical compositions in the pools of those organizations; and each of them is authorized to license the ASCAP pool in its respective geographical area. The membership of those organizations includes more than 130,000 writers and publishers. [E 44, 46, 56; Finkelstein D 550]

ASCAP licenses all categories of domestic users, including television networks and stations, radio networks and stations, wired music services (*e.g.*, Muzak), theaters,

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*Unless otherwise indicated, reference to the licensing of music shall mean the licensing of nondramatic performance rights.

concert halls, night clubs, restaurants, bars, skating rinks and the like. The only form of license that ASCAP affirmatively offers to users is a blanket license to the entire ASCAP pool. (Under the 1950 consent decree, ASCAP is also required, upon a broadcaster's request, to issue a blanket license under which the fee is paid on each program using ASCAP music, rather than on an annual basis; but all commercial television networks and, with *de minimis* exceptions, all commercial television stations in the United States have held and now hold standard ASCAP blanket licenses.)* [400 F. Supp. at 741-44, JA 588-91; E 5 (para's. 8, 9), 603; PX 412; Marks Tr. 2418-19; Finkelstein Tr. 3769, 3804-05]

The blanket license ASCAP offers television networks, including CBS, contains the following principal provisions:

(a) The network receives the right to use the entire ASCAP pool.

(b) For that right, the network pays a flat fee or fixed percentage of its income, which fee does not vary in relation to the nature or quantity of the uses the network makes of ASCAP music during the license term.

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*The blanket license providing for the alternative method of payment described above is generally referred to, for short-hand reference, as a "per-program" license. Its utility is limited to broadcasters whose schedule consists predominantly of non-musical programming (E 633; Finkelstein Tr. 3769-70), and ASCAP has evidenced considerable resistance in prior consent decree proceedings to even quoting fees for such a license in the rare instances in which broadcasters have requested such quotations (PX's 966, 970-71, 977, 979-81).

The court below suggested that a "per-program" license might be adaptable for television network use, but what the court actually described, as will be discussed more fully in Point III, *infra*, was the per-use license sought by CBS as alternative relief in this lawsuit. In all events, as will also be discussed in Point III, licensing by the ASCAP combination on a blanket basis under a per-program payment format is as much price-fixing as licensing on a standard blanket basis; and the only difference is that the per-program format imposes additional restraints on competition.

(c) Moreover, that fee remains constant irrespective of any direct licenses obtained by the network or program packagers from ASCAP members—thus, for the network to obtain direct licenses would result in the network paying twice for the same rights.

[400 F. Supp. at 742-43, JA 589-90; E 427-29, 907; PX 22; Sipes Tr. 24-25; Fisher Tr. 1652-53, 1684; Nathan Tr. 4011-12; Finkelstein D 610-13]

Although networks (and other users) have the right, under the ASCAP decree, to apply to the district court for the setting of a "reasonable" fee for an ASCAP license, and while many such applications have been made, the court has never had occasion to determine license fees, since all such proceedings have been concluded by negotiated settlements (400 F. Supp. at 743-44, 753, JA 590-91, 600; Finkelstein Tr. 3805-06). From 1962 to 1969, the yearly fee CBS paid ASCAP for a blanket license increased from $3,572,000 to $5,680,000.* Since the commencement of this lawsuit on December 31, 1969, CBS has been operating under an interim license provided for by the ASCAP decree. [400 F. Supp. at 743, JA 590; E 5 (para. 10), 124, 907]

All ASCAP revenues in excess of administrative expenses are distributed to its members on essentially a per-use basis (400 F. Supp. at 742, JA 589; E 139, 254; PX's 58, 530, 903).

For distribution purposes, ASCAP surveys the performances made of its members' music by broadcast li-

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*The court below found that CBS's "cost for ASCAP or BMI music runs about $1,000 per program" (400 F. Supp. at 743, JA 590). That finding is based on the same statistical fallacy (adopted from defendants' post-trial papers) that discredits other data set forth in the opinion (*e.g.*, 400 F. Supp. at 757, JA 604) and is extremely misleading. For included in the number of CBS programs cited by the court to arrive at the $1,000 average cost are more than 1,000 CBS news and sustaining programs which do not use any music and many hundreds of five-minute children's educational programs which use little or no music—facts that multiply by many times the "average" fee for programs using substantial quantities of music (PX's 540-46, 838; AX 287).

censees and several categories of non-broadcast users (*viz.*, wired music services, symphony orchestras, other serious concerts and educational institutions). ASCAP's survey of television network uses is conducted on a census basis. Pursuant to the terms of the license, each network, including CBS, is obligated to provide ASCAP with music logs (or, in the case of theatrical motion pictures, cue sheets) which set forth, with respect to each program, the titles of the compositions used, the names of the writers and publishers (which, in many cases, have previously been supplied by ASCAP during the clearance process*) and the nature of each use (feature, theme or background). ASCAP then checks those logs (or cue sheets) for accuracy and enters such information into its computer system. ASCAP surveys other users on a sampling basis and similarly feeds into its computer system the information thus obtained. [E 209, 491, 907, 1138; Poklitar Tr. 2060-62; Marks Tr. 2445, 2455-58, 2465, 2469-73, 2477-79]

Under ASCAP's distribution formulae, different credit values are assigned to different types of music usage, based on such factors as categories of performance (feature, theme or background) and the economic status of users. In accordance with those formulae, each ASCAP member receives a prescribed number of credits in respect of each performance picked up in the survey. At the end of a distribution period, ASCAP's total distributable revenues are split into equal writer and publisher segments; total writer credits are divided into total writer distributable revenues to produce a cash value for each writer credit; and the same process is applied to the publisher half of the revenues to produce a dollar value for each publisher

*Prior to the filming of television programs, representatives of the music clearance section of the CBS Business Affairs Department call the appropriate personnel at ASCAP and BMI to ensure that compositions selected for use by producers are covered by the respective blanket licenses. Frequently during that process, the music clearance employee will obtain the names of writers and publishers of compositions so as to be able to prepare accurate program logs. [Poklitar Tr. 2060-2062]

credit. On distribution, each publisher member and each writer member electing to receive distributions on a current performance basis receives an amount equal to the number of credits it (he) has earned times the cash value of each credit. [E 139; PX 903; Marks Tr. 2479-84, 2498, 2500-09]

Writers also have the option of receiving distributions under a four-fund plan which has the effect of deferring part of their income and compensating them additionally for longevity of membership and the recognized status of their works (E 139; PX 903; Fisher Tr. 1761-63, 4824).

C. BMI and Its Relationship to CBS.

BMI is a nonprofit corporation with its principal office in New York, N. Y. It was formed in 1939 by broadcasters at a time when it appeared that broadcasters and ASCAP would be unable to agree on new licensing terms at the expiration of the then current licenses. There are approximately 500 BMI stockholders, all of whom are broadcasters. CBS was one of the original founders of BMI and a shareholder until 1959. On April 3, 1959, CBS returned all of its stock in BMI to that corporation and has had no further connection with it. The other networks have similarly divested themselves of BMI stock. [400 F. Supp. at 742, JA 589; JA 65, para. 5; E 371; Finkelstein Tr. 3587; Cramer Tr. 4247-48]

BMI is affiliated with more than 10,000 publishing companies and 20,000 writers of musical compositions. As is true of ASCAP, BMI has been engaged since its creation in the business of licensing the performance rights to the copyrighted musical compositions owned by its affiliates. BMI also, on behalf of its affiliates, polices unlicensed uses of their copyrighted music and institutes actions for copyright infringement against unlicensed users. [400 F. Supp. at 742, JA 589; E 646; PX's 509, 531, 580]

As a condition of affiliating with BMI, each writer or publishing company must execute a standard writer-or publisher-affiliation agreement. Under that agreement, the affiliate grants BMI the exclusive right to license all of his (its) musical compositions then existing or thereafter created, on whatever terms and conditions BMI deems desirable. [JA 65, para. 5; E 577, 582, 587]

The total number of copyrighted musical compositions owned by current affiliates, and therefore the number of compositions in the BMI pool, exceeds 1 million. [400 F. Supp. at 742, JA 589; JA 71, para. 27; Cramer, Tr. 4250]

Additionally, BMI has entered into affiliation agreements with foreign licensing organizations in 32 countries. Under those agreements BMI is authorized to license in the United States all the musical compositions in the pools of those organizations; and each of them is authorized to license the BMI pool in its respective geographic area. [PX 531]

BMI licenses the same categories of domestic users as does ASCAP, and does so on a blanket basis. All commercial television networks and, with *de minimis* exceptions, commercial television stations have held and now hold BMI blanket licenses. The basic provisions of the BMI blanket license are identical to those of the ASCAP blanket license as described above. [400 F. Supp. at 741-43, JA 588-90; E 888; PX's 439-40; Cramer Tr. 4251, 4322]*

In 1969, CBS paid BMI $1,607,114 for a blanket license; that amount was set by the court in this case as an interim fee (320 F. Supp. at 389, 395); and that fee was later raised to $1,700,000, subject to retroactive readjustment "to reflect the determination of the case on the merits" (Stipulation and Order entered on September 25, 1972, para. 4).

*A consent decree entered in 1966 in *United States* v. *BMI* (S. D. N. Y.), requires BMI to issue the same forms of license, on a user's request, as does the 1950 ASCAP decree, but, unlike the latter decree, does not provide for judicial rate-making proceedings (E 1568).

All BMI revenues in excess of administrative expenses and amounts set aside for certain reserves are distributed to its affiliates on a per-use basis in accordance with BMI's published payment schedules (E 563, 570; PX's 531, 580, 984).

For distribution purposes, BMI surveys television network uses on a census basis and other broadcaster uses on a sampling basis. Under the terms of their blanket licenses, television networks, including CBS, are required to send music logs and cue sheets to BMI (which are the same logs and cue sheets the networks send to ASCAP), and the information contained therein, as well as the data compiled by BMI in its survey of other broadcast users, are entered into its computer system. [E 646, 888; PX's 439-40, 580; Poklitar Tr. 2060-62; Cramer Tr. 4255a-56]

Under the BMI payment schedules, writer and publisher affiliates receive stipulated amounts for each broadcast use of their music picked up in the BMI survey. Those amounts vary depending upon the identity of the user (TV network, radio network, TV station, radio station), the nature of the song (*e.g.,* movie and Broadway show music, popular song), the nature of the use (feature, theme or background), the duration of the use (in the case of background uses), and, in respect of television uses, the time of day of the performance (prime time or daytime). [E 563, 570; PX's 510, 984]

D. Comparison with Other Music Licensing Markets.

Other rights in copyrighted music which are licensed to users include mechanical, theatrical motion picture synchronization and performance, and television sychronization, rights.* Since ASCAP and BMI are not engaged in

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*The mechanical right is the right to record a copyrighted composition on a phonograph record. The right to exhibit a nondramatic performance of a musical composition in a motion picture is equivalent to the nondramatic performance right for television use. The synchronization right is the right to record a copyrighted composition in the sound track of a film or video tape. [Berman Tr. 775-77; Mingle Tr. 852-53]

those fields, there has been a need for direct-licensing facilities, and they have been created. In addition to each publisher's own facilities, the industry generally employs the brokerage services performed by the Harry Fox Agency Inc.* or similar organizations. By virtue of the fact that copyright proprietors deal directly with users, those markets are characterized by price competition between individual compositions and among proprietors. [400 F. Supp. at 759-60, JA 606-07; Berman Tr. 824-27, 846-47; Mingle Tr. 858-60, 868, 870-77, 889-90]

The direct licensing of performance rights for television network use would be roughly equivalent, in terms of the complexity of each transaction, to the direct licensing of movie rights; but the number of such transactions required for a single network would be many times the several hundred transactions that annually occur in the motion picture field (E 671; PX 835; AX 287; Berman Tr. 844-45; Chiantia D 282). Thus, direct-licensing facilities for television network transactions would have to be substantially more extensive and, because of the time pressure under which television programs must be produced, would have to permit those transactions to be conducted with considerable speed (*ibid.;* Wright Tr. 408-11, 415-18, 467-68; Vincent Tr. 583-88; *also see* pp. 84-89 *infra*).

However, so long as the television networks have blanket licenses, they are economically foreclosed from engaging in direct dealing, since direct dealing would involve paying twice for the same music. So long as the present blanket system can be maintained, publishers and writers are insulated from the need to compete on a price basis; and their voluntary expenditure of the considerable effort

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*The Fox Agency was established in the 1930's by the Music Publishers Protective Association ("MPPA"), now known as the National Music Publishers Association ("NMPA"). When Mr. Fox died in 1969, the Agency was incorporated as a wholly owned subsidiary of the NMPA. The Fox Agency now represents between 3,000 and 3,500 music publishing companies. [Berman Tr. 771-72, 790, 822-23]

and money required to create direct-licensing facilities (*see* Point II.B.2, *infra*) for the privilege of engaging in price competition would be a self-defeating course of conduct. So long as there is no market machinery for direct dealing by the networks, no single network can afford to forego its blanket license, since to do so would put it at a serious competitive disadvantage *vis-a-vis* the other networks.

Moreover, each network now has a huge inventory of programs and films containing music covered by blanket arrangements but not otherwise licensed; and there is no practicable alternative, short of continuing the blanket license (or obtaining judicial relief*), for either using those present inventories or purchasing broadcast rights to theatrical motion pictures in which copyrighted music has already been recorded (but not licensed by the writers or publishers for television use) (*see* Point II.B.3, *infra*). Obviously, when a network has already paid tens or hundreds of thousands of dollars for the broadcast rights to a film, or has indicated that it desires to do so, and when the film cannot be used unless the music recorded in its sound track can be licensed, the proprietor of that music has enormous artificial leverage.

The inutility of a bypass will be discussed more fully in Point II, *infra*. The present lack of price competition and the absence of direct-licensing facilities are not matters in dispute.

The latter is a stipulated fact (E 6, para. 16; *also see* Addendum E to this brief). As to the former, Professor Fisher (economic expert witness for CBS) and Mr. Nathan

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*In *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S. D. N. Y. 1948) (two opinions), a decision holding ASCAP to be guilty of price-fixing and monopolization, the court, in effectively ousting ASCAP from the market there involved, enjoined ASCAP and its members from enforcing copyrights as to such "music-in-the-can" (*id.* at 904-05). In the present case, either form of relief requested by CBS would provide that music-in-the-can be licensed by ASCAP and BMI to CBS at court-determined per-use rates.

(economic expert witness for ASCAP) agreed that price competition does not now occur among copyright proprietors in the licensing of performance rights to television networks (Fisher Tr. 1651-53; Nathan Tr. 3983), as did Dr. Fagan, ASCAP's Chief Economist (Fagan D 417-21, 423-24). Indeed, in view of the facts that all television networks have always held ASCAP and BMI blanket licenses and that those licenses effectively preclude any direct licensing of ASCAP or BMI music, the point is too obvious to require extended discussion.

SUMMARY BASIS FOR REVERSAL

This case should have been decided on the basis of the fact that defendants are selling at fixed prices. The "retained right" of ASCAP's members to sell at "negotiated price[s] for each license" (400 F. Supp. at 781, JA 628) is irrelevant in law to the Section 1 offense (and, as to the BMI defendants, who have granted that organization exclusive rights, non-existent on the face of their affiliation agreements*). Members of a price-fixing conspiracy always

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*The BMI consent decree permits direct licensing of only "specified performances" made "directly to the public" (and upon written consent "of all writers and publishers" in interest). That exception to BMI's exclusivity is limited to performances before a live audience and is not intended to encompass network performances electronically transmitted to a television audience. BMI's President, Edward Cramer, so admitted in a deposition taken in *BMI* v. *NBC* (70 Civ. 1785, S. D. N. Y.) (E 627).

If, as we believe, BMI's exclusivity with respect to television performance rights is unaffected by the decree, then even the legal standards adopted by the court below would support the conclusion that BMI defendants are price-fixing in violation of Section 1.

However, in the light of defendant's contentions regarding the feasibility of a bypass (which are relevant to the Section 2 issues, though not to the price-fixing offense); in view of our need to show that an order merely rescinding BMI's exclusivity would be insufficient; and in order to curtail discovery on this point; CBS stipulated with BMI that any findings made on that question with respect to ASCAP and CBS would be determinative of the same issues as

have the right to sell at individually "negotiated prices," in view of the unenforceability of price-fixing agreements; and in many cases holding price-fixing to have been committed, such sellers (unlike the sellers here) have actually exercised such rights. The fact that the right retained here is expressed in a consent decree is not material.

Moreover, since defendants are actually selling at fixed prices, it is unnecessary in law to consider what the impact of that arrangement would be on any putative direct-licensing prices, although (a) such an impact should be presumed on the authority of *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940); *United States* v. *Container Corp. of America,* 393 U. S. 333 (1969); and *Plymouth Dealers Ass'n.* v. *United States,* 279 F. 2d 128 (9th Cir. 1960) (where such a presumption of impact on individually negotiated prices had to be reached—and was reached on less compelling economic facts than those involved here—in order to condemn as price-fixing joint activity that did not involve agreements concerning the prices to be charged), and (b) the record here also establishes by explicit admissions that any putative direct-licensing prices (charged CBS in the event of a bypass) would be boosted and stabilized over competitive price equilibrium levels by ASCAP's continued presence in the market.

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between BMI and CBS (*see* Addendum E). The court below held that that stipulation required an assumption that BMI's rights were non-exclusive (400 F. Supp. at 744-45, JA 591-92). The ruling was erroneous, not only because it misconstrued the stipulation, but also because a stipulation of fact cannot alter a legal conclusion—*i.e.,* the exclusivity of the rights which BMI unquestionably obtains under its standard affiliation agreement. *Swift & Co.* v. *Hocking Valley Ry.,* 243 U. S. 281 (1917).

Nevertheless, given the stipulation of fact, it is apparent that BMI cannot be in any better position than ASCAP on this appeal and that a reversal as to ASCAP would necessarily require a reversal as to BMI. Accordingly, this brief will deal primarily with the ASCAP defendants' position.

The court below did not refer to that impact on price, nor did it correctly analyze the *Socony-Vacuum* line of decisions which applies here *a fortiori*. Rather, the central holding below was that price-fixing may be lawfully committed by the ASCAP and BMI defendants so long as they cannot be shown to have "compelled" their customers to accept their fixed prices. Although "compulsion" is an element of tying, it is not an element of price-fixing. Hence, this legal conclusion, on which the entire decision below is predicated, should be reversed as a matter of law.

These propositions are discussed in Point I, below. In Point II, we show that, even if it were assumed (we believe contrary to law) that buyer-alternatives to acceptance of a fixed price were relevant to determine whether price-fixing was unlawful, the test for reaching that determination would not be whether the alternatives were "viable" (as the court below held) but whether they threatened the buyer with competitive disadvantage or other loss. Such threatened injury is presupposed by several of the lower court's findings, and its existence is reinforced by many admissions and by uncontroverted proof as to which the court below made no findings. Although a number of the court's findings with regard to the "viability" of the so-called bypass alternative are clearly erroneous, they are also irrelevant because they relate to an erroneous legal standard; and it is not necessary for this Court to overturn those findings in order to reach a conclusion that a bypass (absent judicial relief) threatens CBS with competitive disadvantage and other loss.

In Point III, we show that the per-program license also imposes a fixed price as well as other restraints not considered by the opinion below. Point IV deals with the monopolization offense; and, as to this charge, the injury

threatened by a bypass (*i.e.,* the barriers to bypass) are directly pertinent.

Although we believe that Points II through IV afford additional and compelling grounds for reversal, they need not be reached in the light of the overriding and dispositive considerations presented in Point I.

ARGUMENT

POINT I

THE ASCAP COMBINATION IS FIXING PRICES WITHOUT STATUTORY AUTHORITY OR THE EXCUSE OF A MARKET-FUNCTIONING NECESSITY: THE "RETAINED RIGHT" OF ASCAP MEMBERS TO SELL AT OTHER THAN COMBINATION PRICES IS IRRELEVANT TO THE CONCLUSION THAT THEY ARE VIOLATING SECTION 1.

A. Basic Principles.

Price-fixing is a *per se* violation of Section 1 of the Sherman Act. *United States* v. *Trenton Potteries Co.,* 273 U. S. 392 (1927). A finding of fact that the practice is going on compels a ruling of law that it violates the statute, without the need for inquiry into the intentions of the participants or proof regarding harmful effects. *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958).

The price-fixing offense is not limited to an agreement among competitors to sell at uniform prices. Any "combination which tampers with price structures" or otherwise "prevents the determination of those prices by free competition alone" is a price-fixing combination. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221, 223 (1940).

ASCAP and its members are fixing prices. That is a physical fact which is not subject to differences of opinion.

If the 22,000 members of ASCAP convened at Shea Stadium and agreed to charge television networks $1,000

for each feature use of a member's composition (and correspondingly lower amounts for theme and background uses), that would obviously represent a price-fixing agreement. If, instead, that meeting elected representatives of the members to constitute a Board which was authorized to set prices for television networks, and the Board then agreed to charge networks $1,000 for each feature use, that too would plainly be price-fixing. If, instead, that Board decided to charge each network $5 million a year for a blanket license and distributed to the members in interest $1,000 in respect of each network feature use, such an arrangement (which is the form actually taken by the present ASCAP system) is even worse in anti-competitive effect than that inherent in the first two hypothetical examples and is also patently a price-fixing agreement.

It is unlawful because the prices charged networks are not determined by price competition among sellers and other unrestrained competitive market forces, but by agreement reached among those sellers. *Citizen Publishing Co.* v. *United States,* 394 U. S. 131, 135-36 (1969)*; *Virginia Excelsior Mills, Inc.* v. *FTC,* 256 F. 2d 538 (4th Cir. 1958).

The fact that such sellers have retained the "right" to sell in other ways and at other prices outside the combination does not mean they are not fixing prices within the combination. Members of a price-fixing conspiracy always retain the legal right to sell independently of the combination (since price-fixing agreements are unenforceable). Indeed, in a number of decisions declaring various price-fixing arrangements illegal, the sellers had frequently or even generally exercised those retained rights. *E.g., United States*

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*In *Citizen Publishing,* the Court held that the common-sales agency device was price-fixing "beyond peradventure" (*id.* at 135) and "exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field" (*id.* at 136).

v. *Container Corp. of America,* 393 U. S. 333, 336-37 (1969); *United States* v. *National Association of Real Estate Boards,* 339 U. S. 485, 488-89 (1950); *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 220-22 (1940); *Plymouth Dealers' Ass'n* v. *United States,* 279 F. 2d 128, 132 (9th Cir. 1960); *Ohio Valley Electric Corp.* v. *General Electric Co.,* 244 F. Supp. 914, 930-31 (S. D. N. Y. 1965).

Moreover, the fact that ASCAP members have retained the "right" to sell at other prices outside the combination, not only fails to dislodge the conclusion that they are fixing prices within the combination, but also fails to suggest how that fixed price could fail to influence the prices of any direct-licensing transactions.* Yet the danger of such an influence is what has repeatedly led the Supreme Court and other federal tribunals to condemn certain types of joint activity as within the price-fixing offense *even though they did not consist at all of agreements regarding the prices to be charged* (*e.g.,* the buying program to decrease over-supply in *Socony-Vacuum;* the exchange of price information in *Container Corp.*; the circulation of a "list" price, at which sales were not expected to be transacted, in *Plymouth Dealers*). Such cases apply here ***a fortiori*** not only because the impact here of the joint activity on competitive equilibrium price levels would be far greater than those previously held unlawful, but also because that joint activity consists of a price agreement itself.

For one cannot thrust down in the middle of what would otherwise be a competitive market an elaborate nationwide sales consortium participated in by all sellers and expect that market to remain competitive—*i.e.,* expect prices still to

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*In reality, there can be no direct licensing under the present system because the barriers to a network bypass of ASCAP are too great. That is the subject of Point II of this brief. The dispositive error of the court below, however, was in deeming the possibility of a bypass (*i.e.,* resort to the "retained right") relevant in law to the price-fixing offense; and that is the subject of this Point I.

be determined by the "unrestrained interaction of competitive forces" *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 4 (1958), as required by the antitrust statutes.

In short, no one questions the fact that ASCAP was fixing prices when its rights, prior to the 1941 decree, were "exclusive." But neither the 1941 decree nor the 1950 decree has stopped, or even purported to stop, ASCAP from fixing prices. They have merely rendered ASCAP's "right" to do so "non-exclusive." And the legality of price-fixing under the antitrust laws has never before depended on the "exclusivity" or "non-exclusivity" with which prices have been fixed. It certainly did not depend on any such factor in *Watson* v. *Buck,* 313 U. S. 387 (1941); *Alden-Rochelle, Inc.* v. *American Society of Composers, Authors and Publishers,* 80 F. Supp. 888, 900 (S. D. N. Y. 1948) (two opinions); and *M. Witmark & Sons* v. *Jensen,* 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed mem. sub nom. M. Witmark & Sons* v. *Berger Amusement Co.,* 177 F. 2d 515 (8th Cir. 1949), where ASCAP was held to be a price-fixing combination despite the "retained right" provided by the 1941 decree.*

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*In *Watson,* ASCAP sought a federal court injunction against the State of Florida's enforcement of a Florida statute which, as summarized by the Supreme Court, declared illegal "price-fixing combinations composed of copyright owners" (313 U. S. at 398). The Supreme Court both upheld the constitutionality of that statute and found ASCAP to come "squarely within" its definition of price-fixing combinations in restraint of trade. Since the Florida statute proscribed only those activities condemned by the Sherman Act as well, the Court's conclusion that ASCAP was a "price-fixing combination" (*id.* at 404, 398) and "in restraint of trade" (*id.* at 404) within the meaning of the state law necessarily determined a Sherman Act offense.

The operative injunctive language of the 1941 decree, *United States* v. *ASCAP,* Civ. No. 13-95 (March 4, 1941), which the Court held had no "bearing upon the state's power to pass the legislation now under attack" (313 U. S. at 403 n. 6), provided that ASCAP

> "shall not, with respect to any musical composition, acquire or assert any exclusive performing right as agent, trustee or

Consequently, the sole factual issue in this case, if any, should have been (and, as defined by the court below in denying ASCAP's motion for summary judgment, initially was) whether there is a market-functioning necessity for ASCAP to continue to act as a price-fixing instrumentality. For in the absence of a statutory regulatory scheme that permits such activity (*cf. Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963); *Jacobi* v. *Bache & Co.,* 520 F. 2d 1231 (2d Cir. 1975), *cert. denied,* 96 S. Ct. 784 (1976)), the only ground on which a price-fixing combination might arguably be allowed to continue would be that it was essential in order to enable the market to function (*cf. Associated Press* v. *United States,* 326 U. S. 1 (1945); *United States* v. *Terminal Railroad Ass'n,* 224 U. S. 383 (1912); *Chicago Board of Trade* v. *United States,* 246 U. S. 231 (1918)).

That was the sole ground on which the Solicitor General supported the "result" (not the reasoning) in *K-91, Inc.* v. *Gershwin Publishing Corp.,* 372 F. 2d 1 (9th Cir. 1967), *cert. denied,* 389 U. S. 1045 (1968) (about which

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otherwise on behalf of any copyright owner, its members or other owner of the performing right. . . ." (para. II(1)).

The 1941 decree also permitted ASCAP to promulgate regulations enabling the distribution of fees through ASCAP and the enforcement of writer-publisher agreements requiring writer consent to direct licensing transactions (enforcement which AGAC was in any event established to achieve, Lane Tr. 1011-12, 1025, 1959-61, 1111-12; Green Tr. 3464-65). That provision obviously related to direct licensing but did not prevent it. The 1950 decree supplanted those provisions and enjoined ASCAP from "interfering" with the "retained right." As discussed above, there were three significant antitrust decisions that went against ASCAP between 1941 and 1950; but none was based on any such "interference." The "interference" in fact occurred—as much during the 1941-50 period as now, and in exactly the same respects (*see* Point II. B.)—but those decisions were not predicated on that ground, any more than this one need be.

more will be said later, pp. 57-63, *infra*). But as the Solicitor General then emphasized,

> "Collective activity necessary for a market [in that case, the licensing of radio stations] to function must go no further than absolutely necessary. For it is only the preservation of the market, not the protection of the copyright privilege, which justifies the combination (cf. *Watson* v. *Buck,* 313 U. S. 387, 404), and it is only for that purpose that the combination is tolerated. Because of the competitive threat represented by ASCAP, the United States sued it under the Sherman Act in 1941 and obtained a consent decree against it. As conditions change[10] or abuses are disclosed, it may become necessary, as in 1950 [citation omitted], for the government to seek modifications of that decree or to file suit for additional relief.
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> "[10]For example, the difficult problem of accounting for millions of separate performances each year may ultimately be solved by developments in computer technology. Such a change might warrant a completely new approach to the operation of the market for performance rights to recorded music." (JA 130-31)

Whether or not price-fixing by the ASCAP combination was ever essential to the functioning of the market for the licensing of performance rights to television networks (whose uses run in the thousands rather than millions), it is obviously not essential now in the light of just such "developments in computer technology." That is the one significant point on which all parties to this case and the court below agreed. (Indeed, ASCAP urged it affirmatively in an attempt to show the practicability of its members' historically unexercised "retained right" (*e.g.*,

JA 364-65)). And since it is clearly unnecessary for ASCAP to fix prices in order to enable the market to function (at least for the licensing of performance rights to television networks), ASCAP must certainly be stopped from continuing to fix prices (at least in that market).*

ASCAP's own general counsel for more than 40 years, Herman Finkelstein, conceded exactly that in his testimony before a special subcommittee of the Judiciary Committee of the House of Representatives in 1956:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the non-dramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." (Tr. 3679)

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*We believe it to be obvious (and thus discuss only in this note) that a customer, such as CBS, of a price-fixing combination has standing under § 16 of the Clayton Act to assert a claim for an injunction against that price-fixing; and that a showing that prices are being fixed is sufficient to establish "threatened loss or damage" within the meaning of that Section as to warrant injunctive relief. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 129-33 (1969).

We also believe it to be clear that the fixing of prices and blanket licensing of performance rights to copyrighted music constitutes copyright misuse. *M. Witmark & Sons* v. *Jensen, supra*, 80 F. Supp. at 849-50; *see also Zenith, supra*, 395 U. S. at 133-41; *United States* v. *Loew's Inc.*, 371 U. S. 38, 45-56 (1962); *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 157-58 (1948); *Tempo Music Inc.* v. *Myers*, 407 F. 2d 503 (4th Cir. 1969). Although this appeal is brought under 28 U. S. C. § 1292(a)(1), the interrelationship between the antitrust and misuse questions should confer ancillary jurisdiction for a resolution of the latter. *See General Motors Corp.* v. *City of New York*, 501 F. 2d 639, 648 (2d Cir. 1974).

B. The Lower Court's Adoption (in Its Summary Judgment Opinion), Then Rejection (in Its Final Opinion) of Those Basic Principles.

It is helpful to an understanding of the final decision in this case to appreciate that the court below had initially applied essentially the analysis set forth above in denying ASCAP's motion for summary judgment in 1972. After quoting with approval the Solicitor General's discussion (quoted above) regarding the market-functioning exception to the *per se* rule as the basis for the present consent decree regulatory system (as opposed to an injunction dismantling the ASCAP combination), and concluding, on analogy to *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963), that anticompetitive restraints could be tolerated only to the minimum extent necessary to serve "the purpose of maintaining an orderly market," the court held:

> "if CBS can prove that the regulatory system can be amended to operate on a more competitive basis [*ie.,* permit competition to occur and still enable the market to function], it would by definition mean that the antitrust laws were being encroached upon more than to the 'minimum extent necessary.' " 337 F. Supp. at 400.

As further stated at the conclusion of the opinion:

> "We express no views at this point as to the feasibility of CBS' 'per-use' proposal [*i.e.,* one proposed 'amendment' to the 'regulatory system' to enable it to function on a more competitive basis] or whether a judicially determined fee is the economic equivalent of a fee fixed in the market

place.[*] We hold only that genuine issues of material fact exist as to these questions and that CBS is entitled to prove its contentions at trial." *Id.* at 401.

There was notably absent from that decision any framing of an issue as to whether the "retained right" could be resorted to, or whether, if it could, it meant that the ASCAP combination was somehow not fixing prices. On the contrary, the court branded ASCAP's activities as "price fixing" which would "be illegal *per se*" but for the possibility of a market-functioning necessity (*ibid*) and mentioned, in passing,

> ". . . we are doubtful *in any event* of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.'[4]
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> ". . .
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> "[4]Furthermore, ASCAP's general counsel [Herman Finkelstein] has acknowledged in deposition the impracticability of a user's being able to fulfill its requirements for music by dealing directly with ASCAP members:
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> " 'Q Let me ask you this. Is it true that large-scale users of copyrighted musical works

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*At trial the proposition that a judicially determined fee might be the "economic equivalent of a fee fixed in the market place" was given short shrift by ASCAP's own economic expert, Robert Nathan (Tr. 3876-78) as well as CBS's, Professor Fisher (Tr. 1737-40). In fact, the point never became a genuine issue at trial because neither group of defendants was willing to attempt the affirmative of such a patently erroneous position.

would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?

"'A I believe they would.

"'Q Is [CBS] a large-scale user?

"'A Oh, yes.' (HF Dep. 46-47)" 337 F. Supp. at 401. (Emphasis added.)*

By the time of the final opinion, however, the "key factual issue in the case" had become whether ASCAP's rights were effectively "exclusive" (in the sense of whether a bypass was impossible or would result in a boycott of CBS)**; neither Mr. Finkelstein nor any of his voluminous testimony admitting that point was ever mentioned; and while the court itself held on summary judgment that the critical issue was whether "the regulatory system can be amended to operate on a more competitive basis," it then stated, in its final opinion, that

> "CBS *now* takes the position that the primary question presented for determination is whether the present system can be amended to operate on a more

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*As noted earlier, and discussed at some length below (Point II.B), the present barriers to a bypass, which in Mr. Finkelstein's judgment made it "wholly impractical" are quite removable by decree, but not otherwise.

**Between the issuance of the opinion denying ASCAP summary judgment and the trial, the court did define as a triable issue, in addition to the alleged market-functioning justification, whether the present system "compelled" CBS to accept the ASCAP combination's fixed price. The only antitrust precedent regarding the concept of "compulsion" is that afforded by the single-seller tying cases. Although we argued to the court that such an element was irrelevant to the price-fixing offense (*see* CBS Trial Brief at 14, 17-18; CBS Post-Trial Brief at 13-26), since the evidence compiled in pre-trial discovery was more than sufficient to meet such a test, the defined issue, while legally erroneous, did not present a practical problem. By the final opinion, however, the word "compulsion" had taken on a far more extreme meaning, as is discussed in the following section of this brief.

competitive basis." 400 F. Supp. at 748, JA 595. (Emphasis added.)*

The court reached that result on the basis of an extraordinary fallacy to which we will now turn.

C. The Controlling Fallacy of the Opinion Below.

For its central holding in the suit, the court below relied exclusively on the authority of two cases—*Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969) and *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U. S. 827 (1950)—and the analogy of the single-seller tying decisions to which the rationale of *Zenith* and *Automatic Radio* are related. The reasoning steps were as follows:

1. Since a single seller is not guilty of tying unless he "insists" on selling product A with product B and "compels" buyers' acceptance of that condition, a nationwide combination of thousands of sellers (ASCAP) is not guilty of price-fixing unless the members "insist" on selling only at the agreed-upon price and "compel" buyers' acceptance of that price (400 F. Supp. at 748-49, 781, JA 595-96, 628).

2. Since it generally cannot be determined whether a single seller is "insisting" on or "compelling" a tying

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*Indeed, the court indicated that CBS had presented this issue and the related *per se* point in a belated fashion:

> "Coming after an eight week trial and the accumulation of a bulky factual record, the timing of this contention is unusual." (*Ibid.*)

The fact is that we had urged these points in all substantive briefs written throughout this litigation: (*e.g.*, Plaintiff's Memorandum in Opposition to BMI's Motion for a Preliminary Injunction, July 7, 1970, at 54-62; Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, August 16, 1971 at 30-38) and, of course, the court itself stated on summary judgment that ASCAP's activities would be "illegal *per se*" but for the possibility of a market-functioning necessity.

arrangement (or, instead, selling A with B as a "convenience" to the buyer) unless the buyer *asks* the seller to purvey A without B, it generally cannot be determined whether a combination of sellers is "insisting" on, or "compelling" acceptance of, fixed prices unless the buyer asks the individual members of the combination to sell at other than those agreed-upon prices.

3. Here, CBS did not ask ASCAP members to sell at other than the combination's fixed prices. Hence, unless such a request could be regarded as futile—*i.e.,* unless it could be shown that ASCAP members would boycott CBS or that direct dealing was otherwise impossible ("not a viable method for securing the necessary performing rights") so that the buyer was effectively "compelled" to accept the fixed price—the court cannot conclude that ASCAP members are fixing prices (400 F. Supp. at 753-54, JA 600-01).

That is the very core of the opinion on which everything else hangs or falls. It is fallacious.

The concepts of "insistence" (refusal to sell product A without B) and "compulsion" (the uniqueness or distinctiveness of product A), while elements of the tying offense, have nothing whatever to do with the price-fixing violation. Of course a buyer, in order to establish the fact of tying, must show either that (a) he asked the single-seller to offer the tied product separately, or (b) such a request would have been an act of futility. But the buyer confronted with a fixed price—particularly a price fixed by agreement among virtually all sellers in the industry—surely need *not,* as a precondition for an injunction suit, either (a) ask that combination to please stop fixing prices, or (b) prove that such a request would have been futile (*i.e.,* either that the barriers to following through would

be impossible to surmount or that the request would inevitably inspire a boycott).

The reason that "insistence" and "compulsion" are necessary elements of tying is that, without those elements, the sale by a single-seller of product A with B does not impose a restraint on competition (*e.g.*, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495 (1969)). The reason that those elements are not part of the price-fixing offense is that price-fixing by (necessarily) a plurality of sellers *does* impose a restraint on competition *regardless* of the presence or absence of those elements.

Thus, in the tying offense, if and only if the seller "insists" on selling A with B and the tying product, A, is sufficiently "distinctive" to induce the buyer's acceptance of the tie, will the buyer be foreclosed from a competitive market in which to buy the tied product B; and will other sellers of B be unfairly precluded from selling it to the buyer. Moreover, in the context of such a case, the court obviously cannot determine whether the first element—the act of "insistence"—has been met unless the buyer asks the seller not to tie or such asking is demonstrably futile.

In price-fixing, on the other hand, there is a restraint of competition generated by the single fact that otherwise competing sellers have agreed on the price to be charged on all or some of their sales, or on some form of joint activity that will affect any price-determination factor (*e.g.*, issuance of a list price "reference point"). Such sellers do not have to "insist" on, or "condition," or "compel" *anything;* the agreement itself restrains competition.

For example, assume that U. S. Steel and National Steel agreed to fix the list price of steel products at $1,000 per ton; announced that all customers could order steel at that price without the bother of negotiation; yet offered to engage in negotiations with any buyer willing to accept the

inconvenience and expense of so doing. It would be perfectly obvious that those two companies were guilty of fixing prices, despite the fact that they had *not* "insisted" on selling only at the agreed-upon list price. Indeed, even if those companies (unlike the sellers here) made the preponderance of their sales at other than list prices, their agreement on list would necessarily affect the equilibrium of competive market forces by which price levels are determined in a competitive market—and that in itself would be ample grounds for an injunction prohibiting the continuation of any such agreement.

But to make the facts more directly analogous to the present case, assume that not just U. S. Steel and National Steel but all steel companies in the United States, formed a common-sales agency, agreed among themselves to have the agency sell steel at $1,000 a ton, and each issued the following notice to its customers:

> "For your convenience, we and other steel manufacturers have established a common-sales consortium with headquarters in New York that offers to sell the product of any member corporation at $1,000 a ton. All members have, however, retained their right to deal directly (duly recorded in the membership agreement), and for direct-sales prices, come see us and negotiate."

There is not the slightest difference in law favorable to ASCAP between the almost bizarre illegality of those hypothetical facts and the antitrust treatment mandated by the actual facts of this lawsuit.*

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*It might be noted that tying is not irrelevant to this case (and was argued below), although a finding of tying is unnecessary to the result. When a combination of thousands of sellers (*viz.*, ASCAP) packages the members' products and markets the package through a common-sales agency, it is likely to be collectively tying (block-booking); but since the members' authorization of the common-sales

D. The Impact of a Common-Sales-Agency Reference-Point Price on Competitive Price Equilibrium Levels.

ASCAP distributes approximately $1,000 ($500 to the publisher or publishers; $500 to the writer or writers) for each television network feature performance of an ASCAP composition (and correspondingly lower amounts for theme and background uses) (*e.g.*, Chiantia Tr. 2943-44). From the standpoint of the copyright proprietors, their common-sales agent, ASCAP, is effectively selling feature performance rights to television networks for $1,000 per use (*ibid.*). So long as ASCAP continues to do so (at $1,000, $1,200, $800, or whatever that figure is) that fixed price and all the sales made at it would necessarily warp toward it, and thus stabilize prices in direct-licensing transactions. Any publisher from whom CBS requests a direct-licensing price quotation would necessarily take into account the price at which he is selling to other networks through ASCAP. It becomes a reference point or point of departure—*i.e.*, one determinant of price that does not arise from competitive conditions, but is injected artificially into the market by an industry-wide sellers' agreement.

The degree to which prices would be stabilized could not be quantified even if direct licensing actually occurred; it is not susceptible of ascertainment. But it does not have to be quantified; the very problem of establishing such an impact empirically is one of the major reasons why arrangements

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agent to set the price for the package is also indisputably price-fixing, the decision of illegality need never reach the tying ground.

The fact that the combination is collectively tying does not, of course, warrant the application of the rules of the single-seller tying offense (with its elements of "insistence" and "compulsion") to the price-fixing violation. It seems possible, however, that our argument below that ASCAP was guilty of collective tying may have contributed to just such a misapplication of rules in the court's final opinion.

of this nature are illegal *per se, United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 224, n. 59 (1940). As stated by the Court of Appeals in *Plymouth Dealers' Ass'n* v. *United States,* 279 F. 2d 128, 133 (9th Cir. 1960):

> "The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action."

The fact is, however, that the record of this case is sufficiently copious even to demonstrate, if not the magnitude of the effect, at least the inevitability of its occurrence. For example, when Mr. Chiantia (President of MCA Music; Vice President and Board member of ASCAP; President of the NMPA and Board member of the NMPA and the Harry Fox Agency, Inc.) was asked about the price at which he would be willing to deal directly with CBS, his immediately expressed point of departure was the current ASCAP distribution level of approximately $1,000 per use, and he reasoned from there to a price of $3,000 (Tr. 2943-44). At the other extreme, but illustrating precisely the same proposition, was the testimony of Mr. Vogel (President of Jerry Vogel Music Co., Inc., proprietor of one of the foremost catalogs in the music publishing business, PX 883):

> "Q. Assuming that you had made the decision to deal with CBS for whatever reasons, would you quote different prices for different uses?
>
> "A. No, same price, same as ASCAP." (D 934-35)

Robert Nathan, ASCAP's own economic consultant on its distribution system and its economic expert witness at trial, admitted unequivocally on examination by the

court that the ASCAP price would be a "referent point" or "point of departure" in any direct-licensing transaction (Tr. 4182-83).* As he later expanded on the point:

"Q. Let's assume at this time the ASCAP distribution rate for feature music is $800 and lower fees for other categories.

"Do you think those fees would have any influence on prices arrived at, prices offered by publishers?

"A. Oh, I think it would be one factor. If I were a publisher and you represented producers of Columbia Television and you came to me, I think I would start putting numbers down and say, how much have I gotten in the past, try to figure out that average and think of something and then I think

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*The questioning of Mr. Nathan at that point in the transcript referred to the per-use price which ASCAP would charge under a per-use system (proposed by CBS as alternative relief); and he readily gave the answer noted above. In terms of a reference-point stablilization effect, of course, there is no material difference between such a per-use rate and ASCAP's present per-use distribution amounts to its members.

(It should be noted, however, that there is a major difference in terms of "pry[ing]" this market "open to competition" (*International Salt Co.* v. *United States,* 332 U. S. 392, 401 (1947)) between the present blanket license arrangement and a per-use licensing system. The per-use system would immediately permit direct licensing to occur by freeing the network from the present necessity (under the blanket system) of paying twice for that privilege. It should also spur ASCAP's withdrawal from the market (as the decree in *Alden-Rochelle, Inc.* v. *ASCAP,* 80 F. Supp. 888, 900 (S. D. N. Y. 1948) (two opinions) led to ASCAP's removal from the movie rights market) and thus achieve a total elimination of that stabilization effect. As an alternative to such transitional relief, we have, of course, asked for an injunction against price-fixing which, as a practical matter, means an immediate ouster of ASCAP and BMI on the effective date of such an order.)

Based on his admission regarding the price-stabilization effect of per-use rates, Mr. Nathan necessarily applied the same principle to ASCAP's present per-use distribution rates, as is indicated by the next passage of his testimony quoted in the text below.

I would certainly use that as one of my factors in considering the bargaining price; one factor." (Tr. 4200-01)

"It would", he further agreed, "hover over the atmosphere" (Tr. 4173). It is such hovering that "interfer[es] with the free play of market forces," *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 221 (1940); and it is the inevitability of such interference that leaves no doubt that ASCAP's price-fixing system is unlawful *per se*.

The same "hovering" was admitted point-blank by the BMI defendants at an earlier stage in this lawsuit. For on their motion for a preliminary injunction, they affirmed:

> "CBS cannot hope to persuade any BMI affiliate to license directly unless it proposes to pay more than BMI would . . . ." (JA 106)*

E. The Body of Case Law Which Categorically Refutes the Opinion Below.

We wish to emphasize here that it is unnecessary as a matter of law even to reach a consideration in this case of what the impact of a common-sales-consortium price would be on direct-licensing prices *if* direct licensing actually occurred. In the *Socony-Vacuum* line of decisions, which we shall now discuss, the court did consider what the effect of the joint-activity there involved was likely to have been on price *only because* such activity was *not* an agreement on the prices to be charged, and could be held within the price-fixing offense only if such effect

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*As was true of Mr. Nathan's initial admission on the subject (Tr. 4182-83), BMI's related to the stabilization effect of BMI prices in a per-use system. As Mr. Nathan then conceded, and as is independently obvious, exactly the same is true of the per-use distribution rates each licensing organization applies under the present system.

on price could be presumed. Where, as here, the defendants are actually selling at fixed prices, the fact (both presumptive and proven) that such fixed prices would affect any putative direct-licensing prices is icing on the cake to a holding of illegality.

The court below deemed the *Socony-Vacuum* decision "inapposite" on the stated ground that it involved facts, supposedly "unlike" the present, in which "sellers agreed among themselves as to the prices to be charged buyers for their products" (400 F. Supp. at 748, JA 595).

Were those actually the facts in *Socony-Vacuum,* the decision would be of routine interest here, although hardly "inapposite." For such an agreement obviously exists in this case despite the "retained right" it has in common with other price-fixing litigation. But what makes the *Socony-Vacuum* decision so particularly compelling here—where the district court excused defendants' price-fixing in common-sales-agency sales on the ground that they had not agreed on the prices at which they might otherwise sell—is that the defendants in *Socony-Vacuum* (twelve major oil companies and five individuals) were criminally convicted of fixing the retail prices of gasoline, even though they most certainly never went so far as to agree on those prices.

The period covered by the indictment was 1935-36. Prior to and during that time, retail prices of gasoline had been descending to low levels, largely because of the overproduction of independent refiners in the Mid-West and in East Texas. Originally with the blessing of an NRA industry code, but pursued after NRA had been held unconstitutional, those oil company defendants jointly carried out a program to buy some of the independent refiners' surplus oil in order to decrease the supply of that product on the market.

The defendants in *Socony-Vacuum* did not agree even on the prices at which they would *buy* distress oil, much less at the prices at which they would sell gasoline. The court noted:

> "Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. . . ." *Id.* at 222.

Also, the prices at which the defendants sold were substantially disparate during the period and price-cutting was prevalent (*id.* at 200, 220).

But it is basic economic doctrine that price is a function of supply and demand, so that a joint-buying program to achieve a reduction of supply will tend to increase price (if demand is constant or rising) or stabilize price (if demand is falling). Thus, despite the lack of agreement as to the price as which the defendants bought *or* sold, the agreement to undertake the buying program was branded "one species of price fixing" (*id.* at 223) because

> ". . . in terms of market operations stabilization is but one form of manipulation. And market manipulation in its various manifestations is implicitly an artificial stimulus applied to (or at times a brake on) market prices, a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. . . ." *Ibid.*

And that stabilization effect—that "artificial stimulus"—was held illegal *per se*:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they

> would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. . . . *Id.* at 221.

If the oil company defendants in *Socony-Vacuum* could be held guilty of "one species of price fixing" without agreeing on price at all—and while actually exercising their retained right to sell at individually negotiated prices —because of the presumed price-stabilization effect of the buying program, then ASCAP members must also be guilty of "one species of price fixing," not only because they are actually selling at agreed upon prices within the combination, but also because of the more direct, and actually conceded, price-stabilization effect that such fixed prices would have on any putative exercise of their historically un-utilized "retained right."

It should also be noted, with respect to the *Socony-Vacuum* decision, that the Court's ruling that the joint buying program was illegal *per se* would ordinarily have made it unnecessary for the Court to make specific findings regarding the actual *effect* of the program on prices or the *purpose* for which the program was conceived. For when a joint practice can be held under economic doctrine to affect price and therefore constitute a *per se* violation, evidence of purpose and effect is unnecessary—those elements of the Section 1 offense are conclusively presumed.

Because of the wording of the indictment in that case, however, it was in fact necessary for the Court to find an actual impact of the program on prices:

> "Under this indictment proof that prices in the Mid-Western area were raised as a result of the

> activities of the combination was essential . . ." *Id.* at 224 n. 59.*

But the Court made it abundantly clear (in what is probably the most often cited passage of the opinion) that the price-fixing offense does not depend on such a finding of actual impact:

> "It is the 'contract, combination * * * or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. . . . Price-fixing agreements may or may not be aimed at complete elimination of price competition. . . . They are all banned because of their actual or potential threat to the central nervous system of the economy. . . ." *Ibid.*

Similarly, in *Socony-Vacuum,* the evidence permitted the Court to note that defendants "intended" to stabilize retail prices by their buying program. But again it is clear that the testimony and other evidence concerning such

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*The Court based that finding, as one might expect, on inference. It noted, as the defendants contended, "that there was no correlation between the amount of gasoline which the major companies were buying and the trend of prices on the spot market" but stated, "those facts do not militate against the conclusion that these buying programs were a species of price-fixing or manipulation" (*id.* at 223). Also, it had earlier observed that "there were during the period in question large numbers of retail price cuts in various parts of the Mid-Western area" but found that "they diminished substantially during the spring and summer of 1935" and that "the contours of the retail prices conformed in general to those of the tank car spot markets." (*Id.* at 200.) Further illustrative is the following:

> ". . . the fact that sales on the spot markets were still governed by some competition is of no consequence. For it is *indisputable* that that competition was restricted through the removal by respondents of a part of the supply which but for the buying programs would have been a factor in determining the going prices on those markets. . . ." *Id.* at 220. (Emphasis added.)

an intent was regarded by the Court as unnecessary to a holding that the defendants' joint conduct amounted to price-fixing. For while the Court had noted evidence of unlawful purpose (as well as, it might be added, evidence of purported good intentions), it held that

> ". . . price-fixing combinations which lack Congressional sanction are illegal *per se;* they are not evaluated in terms of their purpose, aim or effect in the elimination of so-called competitive evils. . . ." *Id.* at 228.

In other words, if the oil company defendants had unanimously testified in an otherwise credible manner that they had never formed any intention to stabilize prices, the question of whether their joint buying program constituted price-fixing would not be decided with reference to that testimony but with reference to whether their joint buying program could be presumed to have a price-stabilization effect under normative economic principles.

What the decision therefore nets down to—and the point for which it is universally recognized as one of the leading decisions in antitrust jurisprudence—is that any agreed-upon joint activity among sellers concerning a factor that contributes to the market dynamics by which price is determined, *and which under normative economic principles may thus be presumed to affect price,* is unlawful *per se.* In *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 445 (2d Cir. 1945), Judge Learned Hand recognized precisely that rule of law to be the teaching of the *Socony-Vacuum* decision:

> "It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not necessary,

because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. *The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements.*" (Emphasis added.)

Another "species of price-fixing" exhibiting the "retained right" element thought to be exculpatory by the court below was that held illegal *per se* in *United States* v. *Container Corp. of America,* 393 U. S. 333 (1969), also because of a price-stabilization effect that could be presumed from economic principles even less obvious than those applicable to the present action. As the Court summarized the facts of that case:

> "Here all that was present was a request by each defendant of its competitor for information as to the most recent price charged or quoted, whenever it needed such information and whenever it was not available from another source. Each defendant on receiving that request usually furnished the data with the expectation that it would be furnished reciprocal information when it wanted it. . . .
>
> "*There was of course freedom to withdraw from the agreement.* But the fact remains that when a defendant requested and received price information, it was affirming its willingness to furnish such information in return.
>
> "There was to be sure an infrequency and irregularity of price exchanges between the defendants; and often the data were available from the records of the defendants or from the customers themselves.

> Yet the essence of the agreement was to furnish price information whenever requested." *Id.* at 335. (Emphasis added.)

This "somewhat casual" arrangement did not preclude price competition as the Court noted at 337; indeed the Court found that "the trend of corrugated container prices has been downward" (*id.* at 336).

Nevertheless, the Court held that even an agreement only to exchange price information was a sufficient "agreement" to be within the ambit of Section 1. Moreover, based upon a discussion of the economic reasons as to why such an exchange was *likely* to have a price-stabilization effect in the corrugated box industry, and noting that it "seemed" to do so, the Court concluded that the "inferences" of such an effect "are irresistible" (*id.* at 336-37), which thus

> "brings the case within the ban, for as we held in *United States* v. *Socony-Vacuum Oil Co., supra,* at 224, n. 59, interference with the setting of price by free market forces is unlawful *per se*. . . . Stabilizing prices as well as raising them is within the ban of § 1 of the Sherman Act. As we said in *United States* v. *Socony-Vacuum Oil Co., supra,* at 223, 'in terms of market operations stabilization is but one form of manipulation.'" *Id.* at 337.

The opinion of the district court in this case can no more be reconciled with *Container Corp.* than it can be with *Socony-Vacuum.* The *Container Corp.* defendants not only retained the right to sell at individually negotiated prices; they actually exercised that right. The *Container Corp.* defendants not only did *not* agree on the prices to be charged in the exercise of their "retained rights"; they engaged in price competition which drove prices down.

Moreover, while the Court in *Container Corp.* inferred a price-stabilization effect from the reference points afforded by an "infrequent" and "irregular" exchange of information regarding quoted prices, the reference point established in the present case is an all-industry cartelized price which is highly visable to all sellers—in fact known to them to be the price at which all other sales are made.

A third "species of price-fixing" based on an inferred stabilization effect was that for which the defendant was criminally convicted in *Plymouth Dealers' Assn.* v. *United States,* 279 F. 2d 128 (9th Cir. 1960)—despite its members' "retained right," their lack of any agreement whatever regarding actual selling prices, and their engagement in price competition.

The defendant in that case was a trade association of Plymouth dealers in the San Francisco Bay Area. What it did was to print a set of retail "list" prices somewhat higher than factory "list" prices and circulate it to its members as well as other Plymouth dealers in Northern California. Its stated purpose for so doing was "to eliminate public distrust, occasioned by the previous wide variance in quoted ['list'] retail prices" among Plymouth dealers (*id.* at 133), particularly since the Ford and Chevrolet dealers had uniform "list" prices.

There was no claim in that case that the Association and its members expected such "list" prices to be actual selling prices. Indeed, the court of appeals found that

> ". . . It was not intended to be so used. It was fixed 'high' so a greater trade-in could be allowed. . . ." *Ibid.*

There was also no question but that the Association members engaged in price competition. "The fact," said the court, that "they cut prices in bidding against each other, is irrelevant" (*id.* at 132).

However, it was inevitable that the list circulated by the Association would be used as a reference point in negotiations (and several dealers admitted that it was). That fact, plus testimony "from which it [could] be inferred that some sales actually were made at the list price" (279 F. 2d at 133) were quite sufficient to enable the court to presume a price-stabilization effect and uphold the conviction on the authority of *Socony-Vacuum*:

> ". . . This was 'a factor which prevents the determination of [market] prices by free competition alone.' . . ." *Id.* at 134.

Certainly the court did not purport to make any finding of actual price-stabilization; it eschewed the need for any such proof. As the court stated, "the test is not what the actual effect is on prices" (*id.* at 132). And, as the court later observed,

> "In a deteriorating market . . . no matter what steps are taken to influence prices, sometimes the power of larger economic factors prevail. . . . The very fact that this is extremely difficult of proof is probably one of the reasons why, in its wisdom, the Congress has seen fit to establish the law, and the Supreme Court to establish certain *per se* consequences of the proscribed action." *Id.* at 133.

Fully to appreciate the *a fortiori* applicability of *Plymouth Dealers'* to the facts of this case one need only assume that the defendant Association had actually been set up as a common-sales agency and had itself made sales on behalf of its dealer-members at its circulated "list" prices. In those circumstances, any claim by the Association and its members that they were not fixing prices (because of the dealers' "retained right" to sell on individually negotiated terms) would be ridiculed, not adopted.

In net effect, the Ninth Circuit held that the mere circulation of the "list," without any agreement on the prices of direct-dealing sales, was unlawful *per se* because of the probability that the "list" would tend to stabilize those prices. How much more clearly unlawful would be an arrangement under which sales are actually being made at agreed-upon prices through a common-sales agency device; how much more clearly stabilizing of direct-sales prices would be the prices at which common-sales agency transactions were made.

F. The Impact of Publisher and Writer Resistance to Direct Dealing on Competitive Price Equilibrium Levels.

Stabilization by reference point, however, is only one of the effects that the continuation of the present ASCAP system would have on any putative direct-licensing prices.

The long-standing vacation that publishers and writers have enjoyed from the rigors of a competitive market and the power they have shared as members of a combination have created an understandable and quite compelling resistance to change. No doubt, there is a price at which such resistance can be overcome. But the very fact that there exists in this market another artificial, cartel-created factor which *must* be overcome at a price is what would throw competitive price levels into further disequilibrium and thus reconfirm the illegality of the system, regardless of the so-called "retained right."

In short, the perpetuation of the present system places a premium on its disbandment. That premium would have to be paid by the direct licensor; a cost that has nothing to do with the competitive market price of music.

That such a premium is inferred from the existence of the combination alone is demonstrated by the decision in *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942),

where the Supreme Court rejected the district court's finding that the defendants

> "were willing and intended to terminate their respective agency agreements whenever it should become commercially possible to offer a competitive non-infringing product" (*id.* at 281)

—on grounds that have compelling application to this point:

> "The power of Masonite to fix the price of the product which it manufactures, and which the entire group sells and with respect to which all have been and are now actual or potential competitors, is a *powerful inducement to abandon competition.* The extent to which that inducement in a given case will have or has had the desired effect is difficult, if not impossible, of measurement. The forces which that influence puts to work are subtle and incalculable. Active and vigorous competition then tends to be impaired, not from any preference of the public for the patented product, but from the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition. . . . This kind of marketing device thus, actually or potentially, throttles or suppresses competing and non-infringing products and *tends to place a premium on the abandonment of competition.* It is outside our competence to inquire whether the result was or was not beneficent, or whether the evil was or was not realized. As in case of an appraisal of the reasonableness of prices which are fixed, such a determination could satisfactorily be made

> 'only after a complete survey of our economic organization and a choice between rival philosophies' (*United States* v. *Trenton Potteries Co., supra,* 273 U. S. at p. 398) and only after weighing a host of intangibles. *United States* v. *Socony-Vacuum Oil Co., supra.* The power of this type of combination to inflict the kind of public injury which the Sherman Act condemns renders it illegal *per se. . . ." Id.* at 281-82. (Emphasis added.)

Once again, however, the record of this case evidences precisely that resistance—indeed does so with the most blatant testimonial and documentary admissions of intense antagonism to a competitive system that have probably ever been compiled. Yet as discussed below, the district court did not review that evidence in relation to the premium point to which it applies.

Such evidence is so voluminous that to review only its highlights warranted, in our view, separate addenda to this brief.

Thus, Addendum A summarizes the testimony of publishers and writers regarding their unbridled aversion to the possibility of directly licensing television networks.

Addendum B covers the 3M incident—a case study of the most crude and strident opposition to dealing outside the ASCAP cartel as could be conceived. It reviews, for example, the internal deliberations of the nine major ASCAP publishing corporations (which presently supply approximately 40% of CBS's ASCAP music requirements) which either flatly refused to deal with 3M on an experimental background music project or dragged the negotiations out so long as to moot the question; the pressures brought to bear on the only two significant pub-

lishers which accepted the enormous premiums 3M was offering; the efforts of writers actually to organize a boycott; the urging by ASCAP's General Counsel, Mr. Finkelstein, that the writers' organization, AGAC,* actually sue the two ASCAP Board members who did deal—indeed, an incredible brouhaha over what amounted to the direct licensing of merely 700 songs, *after* the ASCAP and 3M negotiations had irretrievably come apart over structural problems, and in an area so minor in comparison to the direct licensing of a television network that at least two of the publishers who dealt flatly admitted that the greater threat to the ASCAP system posed by a network bypass attempt would either preclude or substantially restrain their willingness to participate in the latter.

We particularly urge the Court to review this addendum. Although the lower court's discussion of the incident closely parallels the description in defendants' post-trial briefs, it bears about as much relationship to the actual facts as a plot synopsis of "Fanny Hill" might bear to the unexpurgated version.

Addendum C concerns the *Shenandoah* incident which should be referred to not only for the concerted refusal of ASCAP publishers to permit television stations a form of ASCAP license designed to permit some degree of direct dealing, but also for the trial testimony of ASCAP's General Counsel on the subject, the proven disingenuousness of which served to re-emphasize the incident's importance.

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*The American Guild of Authors and Composers, formerly known as the Songwriters' Protective Association, has a membership of approximately 3,000 writers of music, including substantially all of the authors and composers of the "standard" compositions (PX's 429, 461, 985; AX 235; Green Tr. 3464). Under AGAC's minimum basic contract (which AGAC members execute with publishers), publishers are prohibited from licensing music for various uses (including television performances) without writers' consent (E 433 para's. 4(j-k)), 1229).

As to the independently inferable impact of this sort of ingrained resistance to price competition on competitive price equilibrium levels, the record of this case is no less complete. Thus, Mr. Morris conceded that his antipathy to direct licensing would lead him to refuse to license CBS directly for the same price that he is now receiving from ASCAP in respect of a CBS use:

> "Q. . . . Let us say that the price that CBS is willing to pay you is the same price in effect you are now getting from ASCAP in distributions when CBS uses your music?
>
> "A. No, I consider there is a moral obligation here to the writers with whom I am in partnership with and I couldn't possibly entertain anything of that kind.
>
> "Q. The money would be the same. I am having difficulty understanding that.
>
> "A. The very structure of what I believe would no longer, to me, exist, so I can't see that.
>
> "Q. I guess what I am really asking you, Mr. Morris, is, what is the structure of what you believe?
>
> "A. I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business.
>
> "Q. So you would approach any negotiations with a broadcaster or a network like CBS with a great hesitancy to enter into a direct licensing transaction?
>
> "A. I believe that would be the end of the road for me as a publisher." (D 661-62)*

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*The dire consequences predicted by Morris and other publishers to be the result of price competition are considerably overstated. Music publishing corporations now engage in price competition in the licensing of mechanical (phonograph record) and movie rights (where prices are quite high—*see e.g.*, Mingle Tr. 869-70). And while price

And for Mr. Morris, the price of simply selling an option to CBS (for the sort of "mini-blanket" license the lower court suggested CBS acquire, 400 F. Supp. at 780, JA 627) "would have to be in terms so I would never have to worry again of any problems" (D 732-33).

Moreover, 3M certainly paid substantial premiums over fair market values. Messrs. Brettler and Chiantia anticipated receiving as much as $500,000 apiece from their acceptance of the 3M offer (Chiantia D 312), and the mechanical rights portion of those royalties alone was more than five times the total electrical transcription fees paid by Muzak to the *entire* music publishing industry for a three-year license to use more than 3,000 songs (Berman Tr. 841-42; 3M PX's 50, 52). Indeed, the sum involved for each publisher was substantially larger than the amount each receives in ASCAP distributions for the uses of its music on CBS (Addendum B at 5).

Even those amounts, however, were not large enough to save Mr. Brettler the anxiety of having to "wrestle" with this decision (D 236) or Mr. Chiantia the trouble of having to overcome heated intracompany opposition (Arrow Tr. 1365-67; Brettler D 241; Chiantia D 297-305). In fact, he did not even attempt to do so until satisfying himself and other executives of MCA that there was no longer any possibility that ASCAP itself would come to terms with 3M (Arrow Tr. 1351-52, 1361-62; Chiantia D 288-290, 294). As to the comparability of licensing 3M directly and licensing CBS directly, Mr. Brettler made clear that the CBS premiums would have to be a lot higher:

competition will doubtless reduce prices in the television network field (Fisher Tr. 1664-70, 1737-40; Nathan Tr. 3876-77, 3946, 3984-85; Chiantia Tr. 2952), the resultant price levels will still be substantial (Morris D 714, 739; Washington D 944-46). The fact is, however, that publishers and writers fear the worst in the television field; and their antagonism to the prospect of licensing directly in that area was demonstrated time and again on this record (Addenda A-C).

"I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision—and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. . . .

"Q. Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?

"A. Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television networks would be—I think I used the word—self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited experimental basis . . . .

"Q. You think it is night and day?

"A. No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons." (D 236-37)

It should be emphasized that, while the court below made several findings recognizing the antagonism of publishers and writers to directly licensing CBS, nowhere in the opinion did the the court consider the effect such antagonism would have on the price of any such transactions.

Rather, consistent with the central fallacy of the opinion (reviewed at pp. 33-36, *supra*), the court assayed such evidence *only* to determine whether it proved that ASCAP members would boycott CBS in the event it attempted to deal outside the combination. Thus, the finding ultimately made by the court—that they "would deal . . . at least *ex necessitate*" (400 F. Supp. at 770, JA 617)—does not diminish,

indeed it confirms, the resistance premium factor to which such evidence is actually relevant.*

Quite possibly, the very strength of that evidence, which implies so pointedly that a boycott would in fact occur, may have contributed to the lower court's confusion that boycott, rather than impact on competitive price levels, was the relevant consideration.

But when the evidence is viewed in relation to the point to which it actually applies—with all the outright admissions in this record of both the resistance to direct dealing and the price effect—we respectfully submit that any conclusion other than illegality is intellectually indefensible.

G. The K-91 Decision: an Analytically Unsound Opinion, Unnecessary to the Result in that Case.

ASCAP's only star in an otherwise bleak constellation of adverse antitrust rulings is the Ninth Circuit opinion in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F. 2d 1 (9th Cir. 1967), *cert. denied*, 389 U. S. 1045 (1968); and the reasoning of that case, as the district court here held in denying summary judgment, as the Solicitor General effectively stated in his *certiorari* petition in *K-91*, and as we will now show, affords no rational basis for concluding that the ASCAP combination is not fixing prices.

K-91 was an action for copyright infringement brought by several ASCAP members against a radio broadcaster operating in the State of Washington. The

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*ASCAP, unable to call back these admissions or otherwise rebut the self-evident economic facts of life which they reflect, sought to discount them by referring to them as "snippets" (*e.g.*, Tr. 1179), and the court adopted that term (400 F. Supp. at 767, JA 614). It implies that the admissions were wrenched from a context which otherwise refutes them. The alleged refutation here? The publishers' and writers' self-serving testimony that they "would deal" if CBS properly urged them to do so and made it worth their while—*i.e.*, that they would not boycott.

broadcaster defended by asserting that ASCAP's price-fixing and commission of other antitrust violations constituted copyright misuse, as did ASCAP's failure to comply with a Washington statute requiring it to issue per-piece licenses and file a schedule of per-piece rates. The broadcaster also counter-claimed for treble damages and injunctive relief.

The trial court, in an unreported decision (JA 178), held the copyrights infringed and the defenses and counter-claims insufficient.* The Ninth Circuit affirmed.

If there is a market-functioning exception to the rule condemning price-fixing as illegal *per se,* that affirmance was mandated by the parties' stipulation to the following effect:

> " 'It would be commercially, practicably and virtually impossible for plaintiffs and other composers, authors and publishers to issue a separate license for each performance broadcast over broadcasting stations or to have their payment for such performances on the basis of each individual use.' " (Quoted in the summary judgment opinion in this action, 337 F. Supp. at 400)**

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*There is little to review in the trial court's opinion, for, as the court noted, it had been unable "to prepare a written opinion setting forth . . . my reasons for such conclusion [and] an analysis of the authorities upon which I relied" (JA 181).

**The parties also stipulated that:

> " 'It would be commercially, practically and virtually impossible for defendant and almost all other broadcasters to acquire a separate license for each performance broadcast over commercial stations. . . .' " *Ibid.*

While ASCAP thereby conceded that its rights were effectively "exclusive" with respect to broadcasters, which precluded any bypass assertion by ASCAP for whatever relevance it might have, it more importantly precluded the broadcaster defendants from resisting a market-functioning defense.

It was, indeed, on that ground that the court below (in its summary judgment opinion) distinguished the result in *K-91* from that indicated in the present case:

> "Thus, the parties in *K-91* agreed that no practical alternatives were available to per program and blanket licensing, and none was proposed—which is, of course, the antithesis of CBS' position, and which removed from issue in the *K-91* case the very issue here presented. . . ." *Ibid.*

The Ninth Circuit's affirmance, however, was not based on that market-functioning ground but on three clearly erroneous reasons for concluding that the ASCAP combination was not fixing prices: (1) the right of its members to engage in direct licensing "is fully preserved" (this, despite the cases and principles discussed above and a stipulation which confirmed that direct licensing was "virtually impossible" for radio broadcasters); (2) the availability to broadcasters of judicial rate-making proceedings for a "reasonable fee"; and (3) the conclusion that ASCAP had been "disinfected" by the decree.

1. The Argument That the ASCAP Combination Is Not Fixing Prices Because the Consent-Decree Court Is Prepared to Set a "Reasonable" Price for the Combination's Package.

At the outset there should be dispelled any notion that the "reasonableness" of a non-competitive price, whether judicially or otherwise determined, has anything whatever to do with the purposes of the antitrust laws or the rules laid down in their interpretation.

The Sherman Act says nothing about "reasonable" prices. It is "aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry.* v.

United States, 356 U. S. 1, 4 (1958). What it guarantees are prices determined by "the unrestrained interaction of competitive forces" (*ibid.*); what it therefore prohibits is any combinative practice "which prevents the determination of those prices by free competition alone." *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 223 (1940).

Thus, whether a common-sales agency agrees to sell at a price established by an outside, independent accounting firm authorized to hold hearings for the purpose, set by a federal district court, or geared to the temperature reading in Central Park (*e.g.,* 90°=$900), that price is still not being determined by the dynamics of a competitive market —it is, therefore, non-competitive and fixed.*

In short, the fundamental error in the Ninth Circuit's conclusion that "ASCAP cannot be accused of fixing prices" so long as the consent-decree court is prepared to do so was the Ninth Circuit's failure to recognize the point at which prices are being fixed. ASCAP members fix prices before contact with any user is made and certainly before the matter is brought to the federal court. They do so by agreeing to sell through a common-sales agency, rather than by competing among themselves. All the court has the power to determine under the ASCAP decree is the price tag for the common-sales agency package—*i.e.,* how much each user will turn over to the combination to be funneled back to the members through its distribution system. By so doing, the court by no means supplants—indeed, it implements—the members' price-fixing arrangement.

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*By statutes governing various forms of public utilities, rate making proceedings largely supplant Section 1 of the Sherman Act in so far as it bans price-fixing; but there is obviously no statutory exemption for the ASCAP combination, and absolutely no economic justification for granting public utility treatment, as ASCAP's own economic expert witness so copiously admitted on this record (Nathan Tr. 3880-81, 3909-10, 3971-72, 3979-80, 3983).

2. The Argument That ASCAP Is Somehow "Disinfected" by the 1950 Decree.

The conclusion that seems to flow from the word "disinfected" is that no private party can maintain a claim against ASCAP or its members based on any activity engaged in by them in compliance with the 1950 decree, no matter how violative of the antitrust laws that activity may be and no matter how severely it injures that party. If that is what the Ninth Circuit meant, the conclusion would conflict not only with its own prior dictum (that it was not deciding this "perplexing problem," 372 F. 2d at 3) but with a substantial body of judicial precedent to which the "problem" was not "perplexing" at all.

Obviously, a user, such as plaintiff, which was not a party to the ASCAP consent decree, is not bound by its provisions and thus cannot be estopped from independently prosecuting ASCAP for illegal activities, irrespective of the extent to which they are regulated by, or otherwise subject to, the consent decree. That was the clear holding of *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683, 689-90 (1961), and is particularly appropriate in the light of the true nature of the ASCAP decree.

All the decree is designed to accomplish in so far as users are concerned is to provide access to the pool on "reasonable" rates for those who *seek* a blanket or per-program license. *United States* v. *ASCAP* (*Shenandoah Valley Broadcasting, Inc.*), 331 F. 2d 117, 121-22 (2d Cir.), *cert. denied,* 377 U. S. 997 (1964). Since the decree does not require ASCAP or its members to permit competition amongst themselves or to grant the sort of licensing terms (*i.e.,* per-use terms) which will ultimately have that effect, any user who seeks *those* remedies must seek them in a separate antitrust proceeding. As this Court stated in *Shenandoah:*

> "We have not overlooked appellants' argument that ASCAP's refusal to issue the type of license

they request has anti-competitive consequences which should lead us to resolve ambiguities in their favor. . . . If appellants' position in fact has the merit under the antitrust laws which they assert, they have effective remedies available . . . by a private suit which our ruling here in no way affects. *Sam Fox Publishing Co.* v. *United States,* 366 U. S. 683, 689, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961). We decide only that the District Court did not err in holding that the Judgment as it now stands does not require ASCAP to issue licenses of the sort appellants requested." 331 F. 2d at 124.

Clearly, this Court would not have suggested that the broadcasters in that case seek remedies in antitrust actions, if it considered those remedies to be precluded by the decree.

As the United States Court of Claims held with respect to another government decree:

> "[T]he exception from the decree of [a prohibition against anticompetitive] activities does not signify that they are authorized but simply that they remain as vulnerable to attack as it the decree had not been entered. . . ." *Carter-Wallace, Inc.* v. *United States,* 449 F. 2d 1374, 1387 (Ct. of Claims, 1971)

Indeed, what makes this theory of "disinfection" so particularly bizarre is that the consent decree would not be capable of shielding ASCAP's price-fixing activities from the reach of the Sherman Act even if the decree had *expressly authorized* ASCAP to engage in such activities. As the court held in *United States* v. *Columbia Artists Management, Inc.,* 1963 Trade Cas. ¶ 70,955 (S. D. N. Y. 1963), *aff'd per curiam,* 381 U. S. 348 (1965):

> ". . . [I]nsofar as the decree-imposed requirement of margin operates to allow Columbia to set

resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid." *Id.* at 78,800.

Cf. United States v. *United Shoe Machinery Corp.*, 391 U. S. 244 (1968).

In sum, the 1950 ASCAP decree, far from "disinfecting" or "immunizing" the activities complained of here, is of little more than background interest to the issues presented by this action.

As indicated earlier, the court below reached essentially that view of the *K-91* decision in its opinion denying ASCAP summary judgment. There was, however, in that opinion one significant analytical error which was carried over to the final decision and which therefore warrants brief comment here.

H. The Failure of the Court Below to Distinguish Between the Proper Application of (1) the *Per Se* Rule with a Market-Functioning Exception, and (2) the Full-Scale "Rule of Reason" Test.

The court below held on summary judgment as it did in the final opinion that "a rule of reason test and not a *per se* test should be applied to ASCAP's activities" (337 F. Supp. at 398; 400 F. Supp. at 746, 751, JA 593, 598), although the rationale for that conclusion was far from clear.

At one point in the summary judgment opinion the court seemed to suggest that a consent decree achieves the same displacement of traditional *per se* rules as that effected by a statutory regulatory scheme (337 F. Supp. at 399-400). Of course, there is no more reason why a private claimant should be precluded from asserting a *per se* rule because of a consent decree to which he was not a party than there is any reason why a private claimant should be

precluded by such a decree from bringing suit. *See* pp. 61-63, *supra; also cf. Jacobi* v. *Bache & Co.,* 520 F. 2d 1231, 1238 (2d Cir. 1975), *cert. denied,* 96 S. Ct. 784 (1976). If, as the Supreme Court stated in *United States* v. *United States Gypsum Co.,* 333 U. S. 364, 400 (1948), "price-fixing, without authorizing statutes, is illegal *per se,*" then price-fixing, unrelieved by consent decree (which is obviously not an "authorizing statute") is also illegal *per se.*

At other points in the summary judgment opinion, the court, despite viewing ASCAP's activities as price-fixing "which would otherwise be illegal *per se*", nevertheless indicated that "rule of reason" treatment was justified by the possibly continuing market-functioning objectives underlying the 1950 consent decree.

There is, however, nothing in the mere unproven possibility that a horizontal price-fixing arrangement is essential for market-functioning purposes that should convert what is otherwise a *per se* violation of the Sherman Act into a practice measured by "rule of reason" standards. If the defendant combination can prove that price-fixing is essential, then, to the extent a market-functioning exception exists, that combination should prevail. If such a necessity cannot be demonstrated, then that combination should stand in exactly the same shoes as any other combination.

The only difference would be that in one case the price-fixing combination raised a specious argument of market-functioning necessity, and in the other case the price-fixing combination elected not to advance the contention. To give substantive effect to the mere assertion of an argument— to the extent of converting a *per se* standard into a full scale "rule of reason" test—makes no sense whatever from the standpoint of either the antitrust laws or rules of evidence. Such a conversion would, indeed, be particularly ironic here in view of the fact that the ASCAP combination ultimately abandoned the market-functioning conten-

tion—indeed, attempted affirmatively to demonstrate the opposite (*e.g.*, JA 364-65, 389), and the district court accepted that view (400 F. Supp. at 779, JA 626).

Moreover, there should be no difference, in terms of the liability issues of this case, between, on the one hand, a horizontal price-fixing combination with no market-functioning necessity justification and, on the other hand, a horizontal price-fixing combination whose original market-functioning defense has become obsolete as a result of technological developments.

Undeniably, in dislodging the latter—particularly where it has been the only means of doing business for more than 60 years, and has thus become an entrenched market structure—no one can expect the members voluntarily to dismantle that structure; judicial surgery is needed. But that presents considerations of relief, not liability. For as the Supreme Court stated in *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 159 (1948),

> ". . . the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated. Nor can a vested interest in a practice which contravenes the policy of the antitrust laws receive judicial sanction."

POINT II

THE INJURY TO CBS ENTAILED BY ANY ALTERNATIVE TO THE ASCAP FIXED PRICE PRECLUDES A HOLDING THAT SUCH ALTERNATIVES LEGALIZE THE PRICE FIX, EVEN ASSUMING, CONTRARY TO LAW, THAT ALTERNATIVES WERE RELEVANT TO A DETERMINATION OF WHETHER PRICE-FIXING IS UNLAWFUL.

We showed in Point I that the district court, reasoning by analogy to the single-seller tying decisions, concluded

that a combination of sellers could not be held guilty of price-fixing unless their customers were "compelled" to buy from the combination at the fixed price by the lack of any "viable" alternative.

Since the tying analogy is inapt, the conclusion erroneous, and price-fixing an enjoinable offense whatever the buyers' alternatives may be, this case could have been decided below and may be decided on this appeal, exclusively on the basis of three facts:

> (1) the fact (apparent on the face of the ASCAP membership agreement) that ASCAP members have authorized their representatives on the ASCAP Board to sell their "product" on whatever prices and terms the Board sees fit to do so (E 19; *see* E 68);
>
> (2) the fact that sales (indeed, all sales) of the members' "product" have been made at the fixed price (E 5, para. 9); and
>
> (3) the fact (both proven and ultimately conceded) that such price-fixing is not essential in order to enable the market in question to function (JA 364-65, 389; Fisher Tr. 1653-57, 1663-67; Nathan Tr. 4041-42; Cramer Tr. 4308-12; Fagan D 391-92, 423-24).

That the case was not so decided below was error. We show in this Point II that the error was compound.

For, even assuming, contrary to law, the relevance of buyer-alternatives, (1) their mere "viability" or "availability" could not rationally be held to vitiate a price-fix, if they threatened the buyer with competitive disadvantage or other loss; (2) that threat to CBS inherent in the bypass alternative is supported by the district court's own findings of fact, since they depict such disadvantages and loss even while holding the alternative "viable" and "available"; and (3) the record establishes by uncontroverted proof (which no findings contradict) that CBS would in fact sustain such

competitive disadvantage and loss if it attempted the bypass alternative.

A. Price-Fixing, an Offense That Is Not Made Lawful by the Availability of Alternatives, Is Certainly Not Made Lawful by the Availability of Alternatives That Are Likely to Cause Competitive Disadvantage or Other Loss.

Having reasoned erroneously that seller "insistence" is an element of price-fixing and that it cannot be shown in the absence of a rejected or demonstrably futile buyer request, the court concluded erroneously that the test for determining whether a request (*i.e.,* an attempted bypass) would have been futile was whether that alternative would have been "non-available" (400 F. Supp. at 752, JA 599), "impracticable" (400 F. Supp. at 747, JA 594), or "not a viable method for securing the necessary performance rights" (400 F. Supp. at 754, JA 601) (to mention several of the court's verbalizations of the standard it thought applicable).

It is obvious that a buyer-alternative to the acceptance of a fixed price may be "viable" and "available" yet promise significant competitive disadvantage or other penalties or loss. In that event, the alternative is not likely to be resorted to by any buyer, and the price-fix will remain in place. Since such an alternative will fail to remove the restraint in fact, there is no reason in antitrust policy why it should be held to absolve the restraint in law.

Not only, however, did the district court fail to attach legal significance to the disadvantages and penalties inherent in a "viable" bypass alternative; by holding them to be "largely speculative" (400 F. Supp. at 780, JA 627)*,

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*Evidence of bypass disadvantage that the court did not treat as speculative—for the court did not mention it at all—consisted of direct admissions by defendants that a bypass was completely impracticable (Addendum E; *see also* p. 74, *infra*).

and by repeatedly noting CBS's failure to resort to that alternative in lieu of bringing this suit (so as to obtain "hard evidence" (400 F. Supp. at 762, JA 609) that was not "largely speculative," the court made it apparent that the only way to meet its test—*i.e.*, to demonstrate that a bypass was "not a viable method"—was for CBS actually to try that alternative and fail in some measurable degree. Indeed, the court stated,

> "CBS is not entitled to relief in this suit simply for the purpose of insulating it from the risk of competitive disadvantage vis-a-vis other networks if it makes the business decision to experiment with a new method of music licensing." 400 F. Supp. at 764, JA 611.

It should be noted that this *"new method"* referred to as a subject for *"experiment"* whose *"risk"* is not to be relieved hardly represents some novel concept of how products should be bought, as the court's statement seems to imply, but the very method of purchase which the Sherman Act is principally designed to protect: buying in a competitive market.

Moreover, we believe it to be self-evident that the policy favoring access to competitive markets is sufficiently strong that a buyer confronted with a fixed price from a consortium of sellers is not required to choose between the acceptance of such an arrangement and an alternative that threatens appreciable competitive disadvantage or other loss, let alone actually to incur that loss as a precondition of suit—but rather, on those facts, can obtain an injunction against the continuation of the price-fix.

A buyer from a price-fixing combination always has, theoretically, some alternative to capitulation—*e.g.*, with enough time and money, he can wheedle or bribe the sellers out of their combination; he can even manufacture the

product himself. If buyers had to actually resort to transparently disadvantageous alternatives as a pre-condition to suit, the private injunction action provisions of the antitrust laws would be effectively repealed.

Indeed, the result of the lower court's ruling, if adopted on appeal, would not be merely to protect a price-fix whose buyer-alternatives were obstructed by threatened disadvantage or penalty. It would actually *reward* combinations of sellers, such as those involved here, *in direct proportion to the height of the barriers that they could erect against the possibility of price competition.* The more obvious and potentially harmful those barriers were—and thus the longer the combination could forestall buyers' attempts to gain direct access to its members—the longer would it be impossible for buyers to prevail in antitrust litigation. So long as no buyer tried the alternative and actually failed, the combination would have to be allowed, under the lower court's theory, to continue to stifle competition; for absent such a demonstrated failure, proof of threatened disadvantage would be both insufficient to meet the lower court's legal test (since it would not rise to the level of "non-viability") and "speculative" as an evidentiary matter (since it would not be "hard" evidence of suffered loss).

The antitrust laws obviously countenance no such bizarre results.

It is, of course, firmly established that *actual* competitive disadvantage satisfies the injury element of Section 4 of the Clayton Act and thus supports a suit for treble damages. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 260 (1946); *also see, e.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). Hence, *threatened* competitive disadvantage is "threatened loss or damage" within the meaning of the injunctive provisions of Section 16 of the Clayton Act. If the buyer from a

price-fixing combination could not enjoin that restraint, unless he first availed himself of an alternative that threatened competitive disadvantage, he would be forced to exchange one form of potential injury cognizable under Section 16 for another. Not even the inapt analogy of the tying decisions, relied on by the court below, would support that sort of statutory confusion.

Since a single seller's sale of product A with B restrains competition only when the seller "insists" on that packaged sale and only when the buyer is "compelled" by the "distinctiveness" of the tying product to accept it, "insistence" and "compulsion" are, naturally, elements of the offense. But since, as discussed in Point I, any species of a price-fixing agreement will restrain competition irrespective of any seller "insistence" on the agreed-upon price or, indeed, irrespective of whether any sales are ever made at that price, the concept of "insistence" is entirely foreign to the price-fixing violation.

While the same is true of the concept of "compulsion," at least that element is the one that focuses on buyer-alternatives to acceptance of the tie. Thus, if one deemed it relevant to consider buyer-alternatives to acceptance of a fixed price, then the rule of the tying decisions regarding the "compulsion" element of tying would provide the pertinent test.

In the tying decisions, the element of "compulsion" is satisfied by a showing of the "distinctive" nature of the tying product; and that is clearly established when it is shown that the likely disadvantages to the buyer of resorting to an alternative for the tying product form sufficient leverage to induce the buyer's acceptance of the tie. *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 503-04 (1969); *Capital Temporaries, Inc.* v. *Olsten Corp.*, 506 F. 2d 658, 661-65 (2d Cir. 1974); *Advance Business Systems & Supply Co.* v. *SCM Corp.*,

415 F. 2d 55, 66-68 (4th Cir. 1969) (per Sobeloff, J.), *cert. denied,* 397 U. S. 920 (1970). Thus, the present *arguendo* assumption of the relevance of buyer-alternatives to the acceptance of a price-fix would require an analysis—not of whether the alternatives were "non-available" or "non-viable", as the court below held, but whether, as is done in the tying cases, the likely disadavantages to the buyer of not accepting the fixed price form sufficient leverage to induce an acceptance.

Hence, if there were any reason to consider buyer-alternatives to a combination's fixed price, the only relevant question would be whether those alternatives are *likely* to cause disadvantage. While we obviously believe even that question to be superfluous, there is plainly no need to ask more than that question.

Although there are no price-fixing decisions which expressly state a standard by which buyer-alternatives are tested—since "compulsion" has never before, to our knowledge, been considered by any court to be an element of price-fixing—there are cases dealing with other Section 1 offenses that apply *a fortiori—e.g.,* the boycotting decisions such as *Associated Press* v. *United States,* 326 U. S. 1 (1945) and *Gamco, Inc.* v. *Providence Fruit & Produce Bldg. Inc.,* 194 F. 2d 484 (1st Cir.), *cert. denied,* 344 U. S. 817 (1952).

In those cases, combinations of sellers were accused of boycotting because of restrictions they imposed on certain buyers' access to the sellers' "product" (the AP news service; space in Gamco's Produce Exchange Building).* In both cases, the defendant combinations sought to defend on the ground that there were alternatives available to the buyers (UP and INS news services; the adjacent building

*Restrictions, incidentally, that exceeded the minimum extent necessary to serve the market-functioning purposes for which those combinations were permitted to exist.

and the one across the street). In each case, the Court rejected the alternatives as a matter of law because of the likely disadvantage inhering in them. As stated by the Supreme Court in *Associated Press,* "a newspaper without AP service is more than likely to be at a competitive disadvantage" (326 U. S. at 17-18).

There is no difference favorable to ASCAP between those cases and this one. If disadvantages likely to inhere in the alternatives to a boycotted product are sufficient to make a boycott charge stick, then disadvantages likely to inhere in the alternative to accepting a combination's fixed price must also be sufficient to make the charge of price-fixing stick. The fact that the alternative in the price-fixing case consists of pulling the sellers out of their own combination, and in the boycott case consists of seeking alternative sources of supply is a distinction of no anti-trust importance. In both cases the likelihood of disadvantage will preclude the alternative from relieving the anti-competitive effect.*

Of course, one obvious test for determining whether disadvantage is likely to inhere in an alternative to an anti-competitive practice is whether the practice has worked—*i.e.,* whether the victims have capitulated so that the anti-competitive impact has been felt. And that was exactly the test applied by the Supreme Court in *Simpson* v. *Union Oil Co.,* 377 U. S. 13 (1964).

There, a resale price maintenance scheme was sought to be defended by the manufacturer, Union Oil, on the ground that the dealer-plaintiff had signed the offending agreement and could have bought oil elsewhere if he wanted to cut resale prices (*i.e.,* avoid the injury stemming from Union's restriction on his ability more effectively to compete). The Court held:

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*Indeed, if the offense is price-fixing, that effect will obtain even if the alternative is resorted to (which is the central proposition of this appeal—Point I).

> "The fact that a retailer can refuse to deal does not give the supplier immunity. . . .
>
> "There is actionable wrong whenever the restraint of trade . . . has an impact on the market. . . .
>
> "The exclusive requirements contracts struck down in *Standard Oil Co.* v. *United States,* 337 U. S. 293, were not saved because dealers need not have agreed to them, but could have gone elsewhere." 377 U. S. at 16-17.

As is apparent from that language, the Court was not willing to consider whether "going elsewhere" presented Mr. Simpson, the dealer-plaintiff, with an adequate alternative to a Union Oil franchise. The determinative point was that, as a matter of historical fact, the resale price maintenance system engaged in by Union Oil, in combination with its network of dealers, had an "impact on the market"—*i.e.,* it had worked—because all dealers had submitted to the practice; so that buyer-alternatives, by which Mr. Simpson might have escaped, were irrelevant.

Again, there is no distinction favorable to ASCAP between the grounds for decision in *Simpson* and those indicated here. In *Simpson* the dealer/buyer-plaintiff sought to avoid participation in a price-fixing combination. Here, the plaintiff-buyer seeks to avoid acceptance of a fixed price. Mr. Simpson was not required to prove actual disadvantages inhering in the alternative to the price-fixing; and the maintenance of his suit was not pre-conditioned on his having attempted those alternatives and suffering actual loss. There is no reason why CBS should be held to any higher standard of proof regarding the disadvantages inhering in the alternative proposed here; nor likewise why it should have to suffer actual disadvantage before seeking equitable relief.

Moreover, once the evidence of the disadvantages patently inherent in a bypass attempt are considered against the

"likely disadvantage" test (as they never were by the court below), it is not only apparent that this record amply meets such a standard, but also perfectly obvious why the networks need not give prolonged consideration to attempting any such putative alternative.

B. Injury in Fact Threatened CBS by any "Viable" Alternative to Acceptance of the ASCAP Fixed Price.

1. Direct Admissions of the Impracticability of a Bypass.

The most striking evidence regarding the so-called bypass possibility consists of defendants' outright admissions that such an approach is impractical (admissions which go further than the legal standard discussed immediately above would require) as well as their concessions of the elements of injury inherent in such an attempt.

Those admissions are in the form of defendants' pleadings, briefs, affidavits and offers of proof submitted in this case and various consent decree proceedings; the testimony given on deposition and trial of the man who for 40 years was the dominant force in the ASCAP organization, Mr. Finkelstein (and whose judgment that a network bypass was "wholly impractical" was reiterated in many different ways throughout the transcript); and, most conclusive of all, stipulations of fact entered into by the parties.

Some of the concessions regarding subsidiary points of fact are covered below. To review all of defendants' conclusory admissions regarding the impracticability of a bypass would greatly enlarge this already lengthy brief, and they are therefore outlined in Addendum E.

Apart from the court's brief discussion of the stipulations, the opinion below did not deal with any of these admissions; yet they were dispositive of even the issues erroneously framed by the court's application of inapplicable legal standards.

2. The Need to Ask ASCAP Members to Disband Their Own Combination Voluntarily, Systemically and at Considerable Personal Effort and Expense in Order to Create the Facilities for a Competitive Market That They Concededly Fear and Detest.

The bypass-injury point to be made here is established by the lower court's findings themselves and by uncontroverted proof as to which no findings are in disagreement.

First, the court found that there does not presently exist adequate marketing facilities, institutional or otherwise, for the direct licensing of published music to television networks (400 F. Supp. at 757, 759, JA 604, 606). Indeed, the parties stipulated that publishers do not even have the "facilities or procedures for processing such requests" (E 6, para. 16).

Second, the ultimate result of creating such facilities (the obsolescence of the blanket-licensing system for television networks and the introduction of price competition on a direct-dealing basis) is the very result publishers and writers want most desperately to avoid (Addenda A-C).

The lower court found that the ASCAP "writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket-licensing system" and "that the cited testimony proves" that they "are apprehensive of dealing directly with CBS" (400 F. Supp. at 767, JA 614). Though adequate for our purposes, it should be noted (as is shown in Addenda A-C) that those findings drastically understate the attitudinal evidence in this case. In point of fact, the explicit admissions of publishers and writers, as well as the contemporaneous documents in their files, demonstrate—without the slightest contradictory evidence having been adduced—that the noted "preference" for the present system is actually the most intense and deeply ingrained desire to preserve it and the noted "apprehension" of direct dealing on a price competitive basis constitutes nothing short of fear and unbridled aversion (Addenda A-C).

Third, the record shows that the present system ASCAP members want zealously to preserve cannot be dismembered—and the direct-licensing system they fear and abhor cannot be created—unless publishers and writers personally bring about that result; and, in the case of publishers, expend a good deal of their own money and effort affirmatively to achieve it.*

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*The only challenge to this point came from defendants' counsels' summary of the data concerning CBS's music usage—and these, to the extent referred to by the opinion below, were predicated on an arithmetical fallacy which is discussed in Addendum D.

What is not challenged is the nature of the individual tasks that each publisher would have to perform in order to participate in a direct-licensing market. And simply a recitation of those steps indicates the scale of the undertaking involved.

Thus, in the first instance, each publisher would have to review all its contracts with its writers to determine which of the compositions in its catalog would require writer consent to direct-licensing transactions (Finkelstein Tr. 3723-25; Brettler D 127-31; Herman D 640; Morris D 663-64, 700; Brackman D 109-10). Each major publisher is likely to have thousands of compositions in that category (Shapiro, Bernstein alone has contracts with some 600 to 700 AGAC writers) and those compositions are likely to be among the most important music in its repertory (E 430; PX's 461, 985; Brettler D 125-26; Chiantia D 266-69; Coleman D 339-44; Morris D 663). For, apart from the AGAC writers, who include the most prominent composers and lyricists of popular works, the only writers to whom publishers will offer such terms are those with sufficient bargaining power to command them (PX's 461, 985; AX 235; Chiantia Tr. 2979; Brettler D 131; Chiantia D 266-69; Coleman D 339-44; Morris D 663-64, 742-43).

The publishers would then have to communicate with all those writers for the purpose of explaining to them the necessity of obtaining their consents; terms would have to be negotiated; and amendments to their existing contracts signed. Publishers would have to hire and train staffs competent to negotiate direct licenses or they would have to retain agents for that purpose (JA 354-57; Brettler D 164-76). In either event, such persons would have to be almost constantly on call and prepared to negotiate on short notice. Each publisher would then have to send to the television network the name, address and telephone number of the person authorized to issue direct licenses, a current list of its songs, together with pricing and ownership information (*e.g.*, information regarding split copyrights), and, of course, keep that information current with follow-up notices of any changes.

(footnote continued on next page)

We respectfully submit that, if the only alternative to the acceptance of a fixed price is for the buyer to ask the conspiring sellers voluntarily to incur expense and engage in efforts that are patently self-defeating from their standpoint, then there is no alternative which can excuse that fixed price.

The publishers would also have to develop contract forms for direct licensing transactions, probably consult attorneys for the purpose, execute contracts for each transaction and incur continuing transactional expense (including the payment of commissions to any agents) (Nathan Tr. 4078; Brettler D 165-67, 195-96, 261-62; Morris D 700-02). Additionally, publishers would have to spend some appreciable time learning the norms and patterns of market prices and forms of transactions so as to enable them to make sensible decisions in the marketplace (Fisher Tr. 1684-85; Berman Tr. 949-50; Brettler D 197-98).

Moreover, the publishers would have to establish procedures and forms, and hire clerical staff, for the purpose of billing CBS for the use of their music, and some centralized monitoring of CBS uses would have to be created or ASCAP persuaded (against its present policy) to continue to do that job (Finkelstein Tr. 3781-83; Steiner Tr. 4416-17, 4436-36a; Fagan D 382, 430-32, 495-96).

The only comment made by the court below on this volume of evidence was to assume that writer consent would be as readily forthcoming here as it was in television synchronization rights (without any focus on the fact that the latter was a field which ASCAP never entered) or that it could be obtained "promptly on a use-by-use basis" (a proposition flatly refuted by the developments in the synchronization rights field—E 430, 439, 486, 1229; Lane Tr. 1076-77). On the latter point, the court also characterized the testimony of Mr. Brettler as showing that "he has *occasional* difficulty contacting a writer who was on vacation or has just changed residence" (400 F. Supp. at 761, JA 608) (emphasis added). The actual testimony of Mr. Brettler was as follows:

> "Q. Do you experience any difficulties in making contact or communicating with your writers?
>
> "A. Well, it's a strange question. Writers change their domicile. They travel, I have experienced a lot of a number of difficulties where we have had to track someone down to get a permission of one kind or another and the mails come back address unknown and the fellow has been in Mexico or is away.
>
> "In that sense dealing with so many hundreds upon hundreds of writers and one never knows what will come up tomorrow or today, I find trouble finding a fellow who I know lives in New York sometimes. Sometimes we want to get him in to revise a song, change a title, change a lyric, do something. *There is always a problem in finding these people.*" (D 137-38) (Emphasis added.)

The injury threatened CBS had it actually pursued this sort of request would be apparent, even if publisher corporations (after consulting with their lawyers, which they actually would do—Coleman D 335-36; Morris D 700-01) had assured CBS that they "would deal" and would affirmatively establish the necessary facilities and procedures.

Most of the things that would have to be done by publishers would not even be visible outside their organizations. And to make the system work, they would have to be done with the same dedication and attention to detail that businessmen normally devote to a project they affirmatively want to succeed. It cannot rationally be a requirement of the antitrust laws that CBS would have to rely on such assurances, despite the manifest economic incentives that publishers and writers would actually have to see the system fail rather than succeed.*

If it did so, canceled its ASCAP license and started attempting to fill its requirements directly, who would compensate CBS for any damages sustained—and by what standard would the amount of such damages be ascertained? Would ASCAP be held responsible for publishers' forebearance from creating facilities or from creating them with the vigor and dedication required? Which particular

*It might also be noted that the expense and burden to publishers of creating these facilities does not excuse a non-competitive system. These, in essence, are the sort of burdens and expenses that independent sellers must assume in any competitive market; and the cost-savings and efficiencies that may be achieved by any cartel or combination is no defense to the suppression of competition that goes with such a system. As stated by the Supreme Court in *United States* v. *Line Material Co.*, 333 U. S. 287, 309-10 (1948), "Despite possible advantages to a stable economy from efficient cartels with firm or fixed prices for products, it is crystal clear from the legislative history and accepted judicial interpretations of the Sherman Act that competition on prices is the rule of congressional purpose and that where exceptions are made, Congress should make them." *See also, e.g., United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610-12 (1972).

publisher corporations would be responsible for such forebearance? And could CBS count on a finding that the losses to it in something as sensitive as program ratings were attributable to the use of second-, third- or fourth-choice music, or some other factor?

We submit that no one responsible for the management of a television network would subject his company to this utterly unrealistic course of action—indeed, would not have to give it more than 10 minutes thought.

Yet this notion that CBS must pursue this approach is the major premise of the opinion below—the "take-it-or-leave-it" direction to CBS if it wants to "experiment" with this "new method" of buying in a competitive market (400 F. Supp. at 764, JA 611).

In *United States* v. *Masonite Corp.*, 316 U. S. 265, 281-82 (1942), the Supreme Court summarily rejected the district court's finding with respect to a similarly supposed "willingness" on the part of defendant-sellers to abandon their price-fixing system. There, the court inferred from the nature of a price-fixing combination the sort of "subtle and incalculable forces" arising out of "the preference of the competitors for a mutual arrangement for price-fixing which promises more profit if the parties abandon rather than maintain competition" and consequently "tends to place a premium on the abandonment of competition." There is, by contrast, nothing "subtle" or "incalculable" about the forces at work here. They are so obvious and explicit as to have been conceded by virtually every ASCAP witness (Addendum A), and in the light of their pertinence to the fact that a direct-licensing system cannot be achieved unless the people subject to these forces undertake a series of costly and burdensome steps, their existence has far greater significance in this case than more "subtle" influences were thought to have in *Masonite*.

a. *The lower court's compartmentalized view of the evidence, failing to connect in any meaningful way publishers' and writers' aversion to direct licensing and their creation of direct-licensing facilities.*

When viewing the transactional and mechanical problems of a bypass given the present lack of direct-licensing facilities, the court focused solely on the physical possibility that such problems could be overcome (400 F. Supp. at 757-65, JA 604-12) and on the purported legal question of "whether the lack of 'machinery'" itself constitutes an "illegal restraint of trade" (400 F. Supp. at 757, JA 604). Not surprisingly the court found that it was physically possible to overcome those difficulties and that their mere existence was not unlawful.

Similarly, when viewing the evidence of antagonism and resistance to direct licensing, the court focused entirely on whether such evidence proved that ASCAP members would "boycott" CBS or whether they "would deal".* Not

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*Despite our constant assertions to the contrary (see our post-trial brief at 40-41; our post-trial reply brief at 28-30; and our proposed findings at 10-11, 99-100), the court actually attributed the urging of such a straw-man issue to CBS—*e.g.*, 400 F. Supp. at 757, JA 604:

> "We disagree with CBS that defendants' mere failure to have created machinery amounts, without more, to an illegal refusal to deal."

400 F. Supp. at 767, JA 614:

> "this [preference for the present system and apprehension of dealing directly] by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis."

400 F. Supp. at 768, JA 615:

> "The conclusion that CBS has failed to prove that the 'disinclination' of writers and publishers to leave the blanket system would ripen into a refusal to deal directly is fortified by the trial testimony."

—followed by a recitation of the patently self-serving testimony of ASCAP trial witnesses to the effect that they "would deal," "would

surprisingly, the court could not find the certainty of a boycott in evidence of aversion to direct dealing or even in past incidents of refusals to deal.

Since neither the physical possibility of overcoming the lack of requisite direct-licensing facilities nor the imminency of a boycott constitutes an issue in this case, all findings made by the court below on these immaterial questions—which is to say, the preponderance of the opinion—are superfluous and may be disregarded.

The only time the opinion attempts to connect (a) the need for direct-licensing facilities with (b) the publishers' and writers' intense antipathy to their creation, is in the purported syllogism that ASCAP publishers would "*logically* create an efficient mechanism to facilitate" the direct licensing of CBS *since* they would be "willing to deal with CBS producers" (400 F. Supp. at 764, JA 611) (emphasis added).

Plainly, that statement is not logical at all. It must be apparent that there is a substantial difference between a publisher's "willingness to deal" (begrudgingly, regretfully and "*ex necessitate*," as the court elsewhere states, 400 F. Supp. at 770, JA 617) if approached by CBS, and the willingness of publishers to spend their own money and exert their own efforts to create the facilities for a system they despise in order to destroy one they venerate.

Nowhere does the opinion below recognize that difference. Yet it is the latter that CBS would have to ask the publishers and writers to do at some point in any bypass approach—whether during a "long period of advance preparation," as the court thought necessary (400 F. Supp. at

. . . talk," "would negotiate," etc., admittedly on a "regretful" basis.

And 400 F. Supp. at 770, JA 617:

> "the testimony of the writer and publisher witnesses persuasively suggested that they would deal directly with CBS, at least *ex necessitate* . . ."

759, JA 606), or in connection with an announcement that it was terminating its ASCAP license "tomorrow" (400 F. Supp. at 759, 765, JA 606, 612).

Moreover, while all findings with respect to bypass made by the court below relate solely to irrelevant questions- - whether a boycott would occur and whether mechanical problems could possibly be surmounted—it is worth reviewing how certain of those findings elide the question of threatened injury to CBS and why others are clearly erroneous in fact.

b. *The lower court's finding with respect to the degree of publisher and writer resistance that would have to be exerted in order to "thwart" direct licensing.*

Consistent with its focus on the illusory issue of "boycott," the opinion below strongly suggested that the publishers and writers would have to take some form of affirmative action in order to "thwart" a CBS bypass (400 F. Supp. at 766-67, 779, JA 613-14, 626). Exactly the opposite is true. The very way for ASCAP members not to have to destroy what they desire to preserve and not have to create what they fear and abhor is for them simply to *refrain* from taking affirmative steps; *forebear* from spending their own money to make it happen; *defer* exerting their own efforts (Fisher Tr. 4799-4801). And it would be abundantly clear to everyone in this industry that they would not have to *refrain* for very long (*ibid.*). For over what period of time could it be expected that a national television network could sustain the sort of competitive disadvantage inherent in its inability to fulfill one of the most critical and elemental requirements of its programming (*ibid.*; Segelstein Tr. 2025-30).

Also, in accordance with its emphasis on "boycott," the court assumed that, "for direct licensing to fail CBS would have to meet with extraordinary coherent resistance" by a "highly fragmented" group of publishers (400 F.

Supp. at 779, JA 626). Again, precisely the opposite is true. There are only 14 large music publishing corporations in ASCAP*—a fact which the court did not mention; they supply CBS with the preponderance of its published music requirements (E 671; *also see* PX's 94, 416)—another fact which the court disregarded; and it required no "extraordinary coherent resistance" for those and other publishers actually to refuse to deal with the *Shenandoah* stations, or for nine publishers actually to refuse to deal with 3M (Addenda B-C).** How much "coherency" would be

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*That fact is apparent from the ASCAP print-outs, showing a substantial gap between the royalty distributions to those 14 publishers and to all others. Those publishers have annually received approximately 60% of the total ASCAP publisher distributions. [E 660; PX's 94, 416; AX 160]

**When the court below found that 27 publishers agreed to deal with 3M on the first series of 3M tapes, the court plainly erred (since the number was 8); but it also failed to note every fact of record that strips that finding of significance to this case: *viz.,* the fact that those who then agreed to deal with 3M (with the exception of three) were second- or third-choice publishers and trivial from a network's standpoint, accounting for only 0.1% of CBS's requirements; the fact that the three referred to either testified flat out that they would refuse to deal with CBS (Jewel Music) or cited reasons for their reluctant agreement to deal with 3M which are grounds in and of themselves for not dealing with a television network (MCA Music, Shapiro, Bernstein); the fact that those three plus the nine ASCAP publishers who refused to deal account for 45% of CBS's ASCAP music requirements; the fact that it took 3M four months to enlist publishers for a relatively small number of songs; the fact that those publishers were not asked to compete on a price basis but were promised uniform amounts under most-favored nations provisions; the fact that those amounts constituted enormous premiums measured in comparison with the publishers' wired music distributions; the fact that no publisher agreed to deal until 3M's dealings with ASCAP had irretrievably and notoriously come apart so that this new source of income to publishers would evaporate unless they dealt directly; the fact that dealing directly in this new, small and experimental field posed little threat to the ASCAP system in relation to the threat posed by a television network bypass ("grains of sand compared to watermelons", said Brettler (D 237)); and the fact, most important of all, that these publishers were not only not asked to create direct-licensing facilities but their participation in the

required for each of the publishers merely to refrain from spending their own money for a relatively short period of time?

c. *The lower court's findings with respect to the physical possibility of creating direct-licensing facilities.*

As to the mechanical problems of direct licensing, the court found that it was physically possible for the Harry Fox Agency to perform the same job in television network performance rights that it now does with respect to other music rights transactions (400 F. Supp. at 763, JA 610). It was necessary to the internal logic of the opinion to reach that view for the court had earlier found that

> "we agree that direct licensing on any major scale would require some central clearing machinery through which transactions could be brokered. Without such machinery, direct licensing might be mechanically feasible, but would be a bulky and inefficient system: for a program producer (or an agent such as the Brody Agency) to contact each of the publishers whose compositions interest him, for every program, would of course be distinctly time-consuming and expensive." 400 F. Supp. at 762, JA 609.

Such a physical possibility, however, is wholly beside the point. All Fox does is to broker transactions—*i.e.*, receive producer requests for licenses and call publishers for their response (Berman Tr. 775; Mingle Tr. 858-60). Thus,

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project was essentially cost-free and entirely risk-free—indeed, an absolute windfall (Addendum C).

Under these circumstances, the fact that major publishers refused to deal, or that any even showed reluctance to so doing, reveals worlds about their attitudes on that prospect that in fairness should have been presented somewhere in this opinion. Yet one may search in vain throughout the entire body of the opinion to find any reference to any one of those facts.

even enlarging the Fox Agency to the size required to broker television performance rights transactions in addition to its other jobs would still not save any publisher from having to perform itself virtually all the affirmative steps listed above or, of course, any part of the expenses of those tasks. They would still have to communicate with their writers, obtain writer consents, negotiate the terms on which such consents would be granted, amend existing contracts with writers, add and train personnel within their own staffs to relate to the Fox office, develop forms, and keep abreast of market trends and patterns. The only jobs that Fox could perform for them on a joint basis which might reduce their own expenses would be the monitoring and billing of CBS—although each publisher's share of the cost of those endeavors would not be insignificant.

It is also noteworthy that the court's findings with respect to the size of the job entailed by the requisite enlargement of the Fox Agency are categorically refuted, point by point, by the evidence not cited in the opinion. Thus, the court assumed that the licensing of performance rights for television network use is as "simple" a task as the licensing of performance rights for theatrical motion picture use (400 F. Supp. at 763 n. 13, JA 610). The testimony squarely on point was that given by Mr. Chiantia (MCA Music's President and Vice President of ASCAP, President of NMPA, and Board member of ASCAP, NMPA and the Harry Fox Agency, Inc.) who obviously disagreed with that conclusion:

> "I must tell you that there is quite a difference between licensing a performance in a feature motion picture and licensing the day-to-day use of compositions in television, for example, and the reason for that . . . is that the use of feature music in motion pictures is rather infrequent. In addition to which, the demand for the music is known well in advance of its actual use. A producer will know months be-

fore he actually shoots the picture that he is going to need a particular composition, that there is ample time to get in touch with the people involved. It is quite a difference. . . ." (D 282)*

The same point, plus the overall impracticability of direct licensing in the absence of machinery created for the purpose, was also flatly conceded in an offer of proof made by ASCAP in the *Shenandoah* litigation (*United States* v. *ASCAP* (*Shenandoah Valley Broadcasting, Inc.*), 331 F. 2d 117 (2d Cir.), *cert. denied,* 377 U. S. 997 (1964)) (discussed in Addendum C):

> "If independent producers were forced to acquire the right for petitioners to perform the musical works contained in pre-recorded programs, those producers would have to engage in innumerable, complex and costly individual negotiations with the thousands of respondent's members. The overall cost of such negotiations would be beyond the reach of most producers, and beyond the competence of most writers and publishers, unlike the relatively simple arrangements by which most television program producers now buy only the narrow 'synchronization' or recording right employed by them." (E 708)

The court did not refer to that admission.

As to the size of the increase required in the Fox staff and equipment (as to which the court stated "CBS did not offer proof," 400 F. Supp. at 762, JA 609), Mr. Berman testified on examination by CBS, that "certainly we would

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*Mr. Chiantia also testified that it would be physically possible for the Fox Agency to broker these transactions, but in view of the nature of the job, only "given the right organization—by the right organization I mean having people involved who know what it is all about and who know how to conduct it" (D 281-82).

have to get a greatly augmented staff, greatly augmented physical facilities" and "it would be a very formidable job" (Tr. 936); and in view of the fact that the annual volume of CBS's own uses of published music would amount to many times the total number of movie rights transactions handled in the Fox office (several hundred, Berman Tr. 844-45, as compared to many thousands, Addendum D) and the relative speed at which licenses have to be transacted, it is apparent that the enlargement of Fox in this field would require the training of not just one or two employees competent to perform the job (done by Miss Mingle and her assistant, Mingle Tr. 881), but more like scores of additional personnel.

As to the "period required to train such personnel," whereas the court concluded without benefit of proof that the time "is presumably measured in weeks or months" (400 F. Supp. at 763, JA 610), the only testimony on the point (again adduced by CBS) was from the person who should best know—Miss Mingle herself—and she verified that the job is sufficiently complex and requires such an extensive knowledge of how to deal with each of Fox's thousands of members that it would take years adequately to train the requisite personnel to perform it (Mingle Tr. 881-83). The court similarly disregarded that testimony.

But the more important point, also elided by the court below, is why would the publishers, who own the Fox Agency, expend the money to create that "greatly augmented staff" and those "greatly augmented physical facilities"? Even apart from all the evidence of antagonism to the direct licensing possibility, direct evidence was given by Mr. Brettler, who is also in a position to know (since he is a member of the Boards of both the Fox Agency and the NMPA), and he summarily rejected the possibility:

> "Q. Suppose the whole thing were given to Harry Fox to do? In other words, Harry Fox was

now designated by the music publishers as an agency which would operate in the same fashion with respect to the licensing of performance rights for television network use as it now operates in connection with the licensing of performance and synch rights for theatrical motion picture use.

"A. Wearing my other hat as a director of NMPA with said board and with having to pass on something like this, I would have to say 'Thank you very much, the Harry Fox Agency has all it can do in its present structure and form to negotiate and handle mechanical licensing.'" (D 192-93)

The court also disregarded that testimony.

The court assumed that the publishers would have Fox undertake the brokering of CBS transactions because they had Fox undertake the brokering of movie rights transactions commencing in the mid-1950's; and that they could obtain writer consents for CBS transactions as readily as they obtained them for both movie rights and synchronization rights transactions (400 F. Supp. at 761-63, JA 608-10). Overlooked in these assumptions are the facts that Fox was not brought into the licensing of movie rights transactions until *after* ASCAP had withdrawn from that field (as a result of the decision in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S. D. N. Y. 1948) (two opinions) and the 1950 decree), so that the publishers literally had no other choice (Berman Tr. 824-25); and that ASCAP has never entered the synchronization rights market (Berman Tr. 826-27). Furthermore, there is again direct testimony on the very point, in which Mr. Morris, after reciting the reactions of writers in the Warner Brothers incident,* re-

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*After more than three decades, publishers still vividly recall that Warner Brothers' attempt at direct licensing led to the exodus from its catalogs of some of the "foremost names in the music world", the "alienation of the writers" and "their completely antagonistic" and "rather violent" reactions (Morris D 646-49, 731).

lated that experience to their predictable reaction to any development of Fox for the licensing of networks while ASCAP remained in the field:

> "ASCAP is a product of, I would say, mainly in the beginning, writers, and a few publishers. That was their child. . . .
>
> "Fox is a clearing house. There isn't any way to compare it. I am not being critical of the function of that, but I know that this would be a very complicated and very difficult and in some cases almost violent on the part of writers as to how they feel.
>
> "Q. Of course, ASCAP used to license motion picture producers before the 1950 decree. It was only after that decree that Fox got into this?
>
> "A. Yes.
>
> "Q. And the writers have been content with that, haven't they?
>
> "A. . . . . You say the writer is satisfied. Once the right was denied ASCAP, this I would say was a compromise of publisher and writer as an expedient way of doing business. . . ." (D 741-43)

And again, the court disregarded that testimony.

Hence, in discussing the physical possibility of the Fox Agency's brokering of these transactions, the court below considered only the surface of the problem, and misconstrued the evidence on that.

d. *The lower court's findings with respect to publisher and writer antipathy to direct licensing.*

To give some economic foundation to defendants' self-serving testimony at trial that "they would deal directly with

CBS, at least *ex necessitate*" (400 F. Supp. at 770, JA 617), the court relied heavily on defendants' further testimony that they greatly desired television network "exposure" of their music (400 F. Supp. at 770-71, JA 617-18). The court, however, did not consider whether the advantages (inherently short-range, if any) of "exposure" on one or several compositions might be outweighed, from the publisher's standpoint, by the long-range disadvantages of having to license all music in a competitive market. Mr. Vogel considered exactly that problem when he testified on deposition "well, we got the other two networks" (D 916) and other publisher witnesses, deposed prior to trial, notably failed to put forth the alleged "exposure" as a ground for overcoming their then freely expressed aversion to a direct-licensing prospect. But more importantly, the court nowhere addressed the question of whether any one of these defendant-publisher witnesses who testified at trial would voluntarily expend their own funds affirmatively to create that *"ex necessitate"* result when mere forebearance from so doing for a limited time would remove the *"necessitate"* possibility.

Also, as a ground for discounting publisher and writer antagonism, the court assumed that "the cost of creating new machinery would be passed on to its music users, just as it is at present through ASCAP, BMI and the Fox Agency" (400 F. Supp. at 764, JA 611). There is certainly no evidence that the Fox Agency is able to pass on all or even the greater part of such costs; indeed, the inferences are otherwise (Berman Tr. 837-38, 920-21; Mingle Tr. 853-54). Furthermore, while ASCAP and BMI may well be able to pass on all of their costs to users, the difference between the ability of such vast and powerful combinations to achieve that result and that of a single music publishing company should have been self-evident.

e. The lower court's findings with respect to CBS's supposed "fault" for the lack of direct-licensing facilities, the time required to create them and the acquisition of "mini" licenses.

Significantly, the district court did find that CBS could not overcome the present lack of facilities, publisher and writer antipathy to direct licensing and the problem of "music-in-the-can" (discussed in the next section of this brief) without working for that result over a substantial period of time (400 F. Supp. at 759, 779-80, JA 606, 626-27). "Indeed," the court found,

> "there is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation." 400 F. Supp. at 759, JA 606.

Even assuming *arguendo* the relevance of buyer-alternatives to price-fixing, that finding should have been determinative of this action. The Sherman Act does not excuse price-fixing because a self-help alternative can be availed of by buyers with a sufficient effort over a long enough period of time. Every day in which sellers engage in such a practice is a day for which treble damages are recoverable (*see Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S., 251, 262-65 (1946)), and thus the practice is enjoinable in advance.

The court found that the absence of facilities which deferred the cessation of the practice was more CBS's fault than that of ASCAP members since CBS had never asked them to create facilities (400 F. Supp. at 757-58, JA 604-05). We need not stop to debate that proposition (beyond noting its refutation by the points made earlier in this section) because "fault" in this context is an irrelevant concept. The facts are that the obstacle exists; that the con-

tinued presence of ASCAP in the field provides compelling incentives against its removal; and thus any attempt by a user unilaterally to overcome it threatens considerable disadvantage and loss. Consequently, whether ASCAP created the obstacle or stands in safety behind it, the result is the same: the price-fix remains intact.

Furthermore, at least brief reference should be made to what the court below found CBS could "realistically" do during this "long period of advance preparation." The court recognized that CBS should not be forced to pay for direct licenses to take effect immediately while retaining its ASCAP license, since that would result in CBS paying twice for the same music. Accordingly, the court suggested that CBS obtain "mini-blanket" licenses from publishers that would take effect at some target date in the future (*e.g.,* one year hence) and cancel its ASCAP license only after it had accumulated a sufficiently "large reservoir of music" by such means (400 F. Supp. at 780, JA 627).

To obtain rights to use a catalog at some future time is, of course, to obtain an option on that catalog. And if there is one fact on which the economists for CBS and ASCAP were in complete agreement it was that CBS would have to pay—and pay dearly—for the purchase of any such options (Fisher Tr. 1700-08; Fagan D 428-29, 524).*

Quite obviously, the prices paid by CBS for any such options would be money down the drain in the event that a sufficiently "large reservoir" were not ultimately amassed by this method—a risk factor of no small proportions. But what would be purchased, in effect, by such payments in the event sufficient "mini-" licenses were obtained?

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*Mr. Morris testified that his price of selling such an option to CBS (not even counting the subsequent usage payments) "would have to be in terms so I would never have to worry again of any problems" (D 732-33).

Certainly not the sort of competitive market which now exists in the licensing of movie rights and mechanical rights, or which would exist in the licensing of television performance rights if similar facilities were created. Producers of motion pictures or films are not forced to make such incremental option payments in order to gain access to publishers' catalogs. On the contrary, as each such producer finds the need for a particular type of composition, he solicits bids from the publishers of those songs and they compete against each other on a price and quality basis (Berman Tr. 829-31; Mingle Tr. 858-60, 868, 877-79).* Neither of those markets is distorted by an artificial option price factor; and there is no reason why this market should be.

Moreover, even assuming sufficient options could be purchased at prices that were not entirely prohibitive, that CBS cancelled its ASCAP license at that time, and then utilized music in the optioned catalogs for the terms of these mini-per-use or mini-blanket licenses, one year prior to the end of those terms, CBS would have to repurchase options for subsequent terms—*i.e.,* repeat the process and reassume the risks all over again. And still there would be no reason to expect the development of the sort of facilities which would enable the direct licensing of each use as its need became known in the production process.

The court below referred neither to these mechanical problems, the risks involved, nor the continued preclusion from a truly competitive market which such an approach would entail. Rather, the court observed that CBS could "build up" this "reservoir" simply "by *requiring*" the large movie companies which produce dramatic and comedy

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*Even if there is only one song on which the producer initially seeks a price, the publisher knows that the producer always has the alternative of altering production plans, and selecting another song, in the event the first publisher's price is too high (Brettler D 134-36, 151-59).

series for CBS to compel their music publishing subsidiaries "to make their catalogs available" for the variety programs, children's programs and other forms of programming (400 F. Supp. at 780, JA 627) which, as the court noted elsewhere in its opinion (400 F. Supp. at 755-56, 778, JA 602-03, 625), were the heavy users of published music (and not produced by the major movie companies). Necessarily implicit in that suggestion is that CBS somehow communicate to each movie company that its production services would not be greeted with favor unless its music catalogs were optioned at the same time. Such "requiring" might or might not work; but it is difficult to imagine a clearer case of tying in violation of Section 1 than that posited by the court's suggestion.

Finally, the court placed considerable reliance on the "conjecture" of Donald Sipes (CBS Vice President in charge of Business Affairs and Planning) that "I think" direct-licensing machinery would "spring up" within a year *after* a judicial declaration that the ASCAP system is illegal and its issuance of injunctive or per-use relief (400 F. Supp. at 764, JA 611). While the court discounted the remainder of Sipes' testimony as "unimpressive" in view of his failure "ever [to have] spoken to a publisher or writer in relation to performance rights licensing" (400 F. Supp. at 765, JA 612), this "conjecture" became a pivotal point in the court's opinion. For the court concluded:

> "If CBS' Vice President in charge of the very subject at hand *concedes* that within one year suitable machinery would 'spring up,' no reason appears on this record why it could not in any event plan to change over to direct licensing, effective one year hence, without a court order to spur the effort." 400 F. Supp. at 764, JA 611. (Emphasis added.)

There is, however, a distinction, made explicit in Sipes' testimony, between (a) a direct licensing system effectively

mandated by court order—and hopefully able to overcome 60 years of ingrained resistance—because a declaration of illegality leaves no other legitimate choice, and (b) an informal request by a single user that publishers and writers voluntarily dismantle a system which they regard as the mainspring of their financial well-being, which they believe to be insulated from antitrust attack, and to which they have every reason to expect the user will soon return irrespective of any protestations to the contrary.

Unquestionably, despite a court order and declaration of illegality, publishers and writers may well refuse to develop direct-licensing facilities; and they may even refuse to deal.* But such possible recalcitrance is no more a basis for denying such declaratory and injunctive relief in the first instance than the possibility that they will accede to a court order is a basis for assuming their voluntary compliance with an informal request.

3. Premiums That Would Have to Be Paid over Competitive Market Equilibrium Levels to Directly License Music Recorded in the Sound Tracks of Existing Programs and Theatrical Films ("Music-in-the-Can").

We now turn to the next barrier to a bypass, which was referred to below as "music-in-the-can" (400 F. Supp. at 775, JA 622).

At any given point in time, CBS has an inventory, worth $100 million or more, of hundreds of programs and theatrical films containing many thousands of performances of copyrighted music** for which CBS does not have music

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*Mr. Sipes also noted that possibility in testimony which the court refused to credit, let alone cite to counter the supposed "would spring up" conjecture (Tr. 118). If it were to eventuate, further supplemental relief might well be required.

**As of March 31, 1973, the date selected by the court for determing the size of this inventory (PX 995, para's. 1-2), the theatrical motion pictures alone contained more than 13,000 performances of copyrighted musical compositions (PX 994).

performance rights other than those afforded by the ASCAP and BMI blanket licenses (400 F. Supp. at 775-77, JA 622-24; Sipes Tr. 49-50, 52-53; PX 995). Absent such blanket licenses, of course, CBS cannot use those programs and films, unless it acquires music performance rights directly from the copyright proprietors.

Much of the music in that inventory is owned by "outside" publishers (those not affiliated with the companies that produced the programs or films) and written by AGAC members or others whose contracts with publishers preclude direct licensing without the writers' consent (E 433, para. 4(k); PX's 461, 994; Chiantia Tr. 2979). The music owned by "inside" publishers (those who are so affiliated) is generally subject to the same writer-consent limitation on direct licenses—either through AGAC or AGAC-type contracts (in the case of published music) (E 433, para. 4(k); Chiantia Tr. 2979) or CLGA collective bargaining agreements (in the case of music written for the program or film) (E 1540, art. 13(c); Green Tr. 3446, 3451-52).

If CBS, having already invested $100 million for rights to broadcast that programming, either abandoned its ASCAP and BMI licenses or announced that it would soon do so, and then attempted to obtain the music rights directly, the leverage conferred to publishers and writers by CBS's possession of an expensive and otherwise unusable inventory would obviously inflate the price of these licenses over competitive market equilibrium levels. Such premiums over competitive price would doubtless vary from extreme demands to the more modest; but overall, on an entire inventory basis, some portion of the price of these transactions would be attributable, not to competitive market values, but to the fact that the music was in-the-can.

The point is economically axiomatic. It was readily conceded by ASCAP's own economic expert, Mr. Nathan (Tr. 3903, 4052), and was confirmed by Professor Fisher (Tr. 1686-87, 4805-08). BMI maintained in its trial memo-

randum (at which time it held a different legal theory of the case) that the music-in-the-can situation would give the copyright proprietor "the power to name his price"; would "result in occasions on which CBS will be unable to use finished material without paying very large sums for performance rights"; and would pose a situation which "CBS would find . . . intolerable" (JA 354).* Mr. Berman, Managing Director of the Harry Fox Agency (whose testimony the court relied on in other respects) gave one example among many based on actual experience:

> "When Maurice Chevalier died, one of the networks, I don't recall which, wanted to replay a special they had done of Maurice Chevalier songs, and [a French publisher] controlled most of the copyrights, and there was a period of very frantic negotiations for several weeks, and [the publisher] stuck to a price, and as I recall, it cost them $10,000 [for synchronization rights] for this repeat run where originally it had cost them something in the neighborhood of $1,000. This is an example.
>
> "The Court: A very good one." (Tr. 929)

And, as Mr. Brettler testified regarding a factually indistinguishable proposition,

> "If I were friendly with Lerner and Lowe and they use one of my songs in My Fair Lady and someone wanted to do My Fair Lady, live on Broadway, and I had the one outside song, I might go very, very high because my bargaining position would be rather impregnable." (D 159)

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*While that statement was made by BMI with respect to music placed in-the-can prior to the exercise of the withdrawal right contemplated by the per-use system (as part of a BMI argument that the system was unworkable), it obviously applies with equal force to a straight music-in-the-can situation.

Hence, in *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888, 900 (S. D. N. Y. 1948) (two opinions), the court, noting the movie producers' position that a bare injunction against ASCAP's licensing of movie theaters would place the producers "in an obviously impossible bargaining position" with respect to music-in-the-can, also enjoined ASCAP and its members from ever enforcing their copyrights as to such performances (80 F. Supp. at 904-05)—*i.e.*, an effective forfeiture of those rights.

Moreover, from the standpoint of a television network contemplating a bypass, the problem is hardly confined to films and programs already in its inventory. The entire world's stock of theatrical motion pictures, for example, contains copyrighted music in the ASCAP or BMI pools. A television network without an ASCAP or BMI license could never seriously contemplate purchasing broadcasting rights to those films without buying music performance rights at the same time. Whether the network itself were to negotiate for such music rights or ask the producers to do so before putting the films up for network bid, the publishers and writers of the music involved would have far more leverage than they would have possessed if the request had been made before the music had been recorded in the sound tracks of those movies. Surely all writers having the right of consent, and all "outside" publishers, would have both the incentive and leverage to obtain premiums; and no producers would agree to bear them unless the network had agreed to reimburse them. While "inside" publishers might not have the same incentive to demand premiums as high, and might have the ability to be more reasonable on music they could license without writer consent, even the price of that music would not be determined by truly competitive conditions; it would inevitably be influenced to some extent by both the leverage inherent in the situation and the prices being commanded

for the other music in these films as to which the incentives to obtain premiums is not abated by the desire to sell films.

Of course there is uncertainty about how high these premiums would go. The very magnitude of that uncertainty is one of the most compelling business factors militating against an acceptance of a situation of this nature. It is absurd to believe that rational businessmen will simply convey leverage of these dimensions to persons with whom they must deal and subject their companies to this sort of problem (Fisher Tr. 4808).

The court below recognized the problem (at least as to the existing CBS inventory) but not its relationship to this lawsuit. Recall, the court's sole focus on the evidence regarding bypass disadvantage (apart from its inquiries concerning physical impossibility) was whether such evidence demonstrated the certainty of a boycott. The court was willing to deem a certainty that copyright proprietors would concertedly "hold-up" CBS on music-in-the-can as the practical equivalent of a boycott (400 F. Supp. at 766, JA 613)—but anything less than such inevitably concerted "hold-ups" was considered irrelevant. As to proof falling short of such certainty, the court said:

> "evidence of the ease or difficulty with which the antitrust laws may be violated cannot be equated to proof that the violation will occur." 400 F. Supp. at 775, JA 622.

As to evidence falling short of "concerted" demands for "hold-ups", the court held,

> "simple greed, independently expressed, does not constitute a restraint of trade." 400 F. Supp. at 776, JA 623.

The issue, of course, is not whether "simple greed", the certainty of "hold-ups", or even the more relevant po-

tential for premiums constitutes in and of itself a restraint of trade. And the issue surely is not whether "hold-ups" or premiums would be "independently expressed" or concerted. The restraint of trade in this case is the ASCAP price-fix. Thus, the pertinent issue, if any (*i.e.*, if buyer-alternatives to a price-fix are relevant at all), is whether an alternative that entails the loss promised by the music-in-the-can problem somehow eliminates that restraint.

Of course it does not. The court's failure to reach that conclusion was attributable, not to its findings of fact, but to the application of an erroneous legal standard which makes those findings irrelevant. In a number of respects they are also clearly inaccurate, but we believe that to be evident from what has been said above, and, in view of the length of this brief, they will not be separately treated.

4. Sanctions That ASCAP Admittedly Imposes on Both Users and Its Own Members for Licensing outside the System

The two barriers to a bypass thus far discussed, which are sustained by the very perpetuation of the ASCAP system, at a minimum threaten CBS with appreciable injury as the penalty for not accepting the ASCAP fixed price (which is all that would need be shown, even if buyer-alternatives to a price-fix were relevant) and, in reality, are sufficiently large as to "compel" (to use the lower court's word, 400 F. Supp. at 765, JA 612) such acceptance.

The barrier to be discussed now, which simply builds the wall higher, is created by admitted and deliberate ASCAP policy.

Thus, to every publisher and writer who accepts ASCAP's common licensing of his works, ASCAP offers an array of auxiliary services, such as (a) the common monitoring, policing and reporting of network uses, (b) the common billing of networks, (c) the common collection and distribution of network payments, and (d) common

negotiations—all over and above the advantages of enlarged bargaining power and insulation from the risks of competitive market (Nathan Tr. 3862-63, 3909-10, 4068; Steiner Tr. 4416-17, 4436-36a; Fagan D 382, 430, 493-501; Brettler D 162-68, 201). Those services, by eliminating the need for duplicative facilities, substantially reduce publishers' and writers' transactional costs (Steiner Tr. 4436-36a); and the common monitoring and policing services are functions which individual sellers could not independently afford (Brettler D 163-64).

To television networks that are prepared to accept the ASCAP fixed price, ASCAP offers: (a) the transactional efficiencies of dealing with one common-licensing agent rather than hundreds of individual copyright proprietors; (b) insurance against the risk of litigation for unintentional infringements; (c) indemnification against infringements (whenever use of the music has been cleared by ASCAP); and (d) relief from whatever portion of the incremental transactional costs of direct licensing would be incurred directly or passed on to the networks in a direct licensing system (Nathan Tr. 3864-66, 3989-90; Steiner Tr. 4386-88, 4393-96, 4433-34, 4436-36a, 4476-78; Fagan D 427, 491-92).

None of the transactional savings or service items listed above, with the exception of common negotiations, is "bad" in an economic sense. Indeed, for shorthand reference, they may be referred to as "good things." They are precisely the sort of efficiencies and economies that could be achieved in any industry, if sellers were permitted to combine, shut down duplicate sales offices, billing functions and the like, and adopt a common-sales-agency system for their product. The potential restraints on competition inherent in such a system, and the leverage it would possess to keep sellers and buyers in line, preclude its adoption for automobiles, steel and other products. That such leverage

is actually being wielded in the present market against networks and members alike—to induce their continued acceptance of the ASCAP system—is indicated by the following three points regarding ASCAP's "good things":

a. None of those "good things" is essential to the functioning of this market. Defendants and their economists have not only conceded this point, they have affirmatively asserted it as a necessary part of their main contention that direct licensing is a feasible approach for television networks (Nathan Tr. 4041-42; Steiner Tr. 4389-90).

b. There is no necessary connection between the more important "good things" listed above and ASCAP's performance of a licensing function. If ASCAP did not license televisions networks at all, its members could (and doubtless would), through ASCAP or other joint facilities, continue to operate common monitoring, policing and reporting and common billing, collection and distribution of royalties (Fisher Tr. 1653-57; Nathan Tr. 4041-42; Fagan D 542-45). And by thus reducing its members' costs in a direct-licensing system, such services would effectively reduce the price of direct licenses to television networks, since at least some portion of publisher and writer costs would be passed on to networks (Steiner Tr. 4436-36a).

Moreover, there is no necessary connection between the rendition of those auxiliary services and licensing on a "blanket" format. Thus, if ASCAP licensed on a use-by-use rather than blanket basis, it could still offer publishers and writers all member-related services; and, at least in connection with ASCAP-licensed uses, could offer networks all other "good things" (Nathan Tr. 4029-31; Steiner Tr. 4430-32).

c. The fact is, however, that ASCAP offers none of those user-related "good things" to any user, *unless* the user accepts a blanket license; and offers none of the member-related "good things" to any publisher or writer, *unless* that member sells through the blanket license (Finkelstein Tr. 3781-88). Without more, that ASCAP policy demonstrates a system of financial sanctions and disadvantages which is the functional equivalent of contractual obligations that once provided for exclusivity on their face.

Evidence that a combination imposes sanctions on both members and buyers for dealing outside of an established price-fixing system is certainly not necessary to prove a price-fixing violation (as is discussed more extensively in Point I). But the existence of sanctions, which is often inferred from the nature of the combination, supplements such a finding. Thus, in *American Column and Lumber Co.* v. *United States,* 257 U. S. 377, 399 (1921), a case dealing with a plan for the exchange of detailed price (as well as production) information, the Supreme Court stated:

> "It is plain that the only element lacking in this scheme to make it a familiar type of the competition suppressing organization is a definite agreement as to production and prices. But this is supplied: by the disposition of men 'to follow their most intelligent competitors,' especially when powerful; by the inherent disposition to make all the money possible, joined with the steady cultivation of the value of 'harmony' of action; and by the system of reports, which makes the discovery of price reductions inevitable and immediate. The sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the

restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals."

And as succinctly stated by the Court in *United States* v. *Nat'l Ass'n of Real Estate Boards,* 339 U. S. 485, 489 (1950):

> "And the fact that no penalties are imposed for deviations from the price schedules is not material. Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line. [(Citations omitted)]"

The point being made in those cases is that a combination need not be shown to apply sanctions against members who depart from the established system, for the simple reason that the members are likely to realize that it is in their common interest to adhere to it. In the present case, the conceded antagonism of ASCAP members toward direct dealing, the patent economic incentives those members have against creating the market machinery in which direct dealing could actually occur, and the evidence of group pressures brought to bear in the 3M, Warner Bros. and *Shenandoah* episodes (Addenda A-C) furnish direct and explicit proof of the very kind of perceived common interest and "subtle influences" which the Court simply inferred to exist in *Real Estate Boards* and *American Column and Lumber,* as well as in *United States* v. *Masonite Corp.,* 316 U. S. 265 (1942), where a similar point is made.

But the point being made here is that, reinforcing those informal sanctions imposed by members upon members, are sanctions which are meted out quite formally and deliberately by the management of the combination itself and are thus more blatant and extreme than any previously

encountered in price-fixing litigation, in so far as we are aware.*

Yet the court below misunderstood the facts of this point and its legal significance.

Principally, the court treated the point as an independent claim for "tying," not relating it at all to the price-fixing charge despite its focus on buyer-alternatives (400 F. Supp. at 781 n. 23, JA 628). It could doubtless be maintained that ASCAP is tying its user-related "good things" to the user's acceptance of a blanket license, but there is no need here to explore the intricacies of such a proposition. The fact is that, unless a television network accepts the ASCAP fixed price, it is barred from the transactional savings this combination can offer (and which are separable from its licensing function)—and that policy additionally obstructs a bypass, irrespective of whether it also amounts to a tying offense.

The district court, however, overlooked the sanctions applied directly to a user by ignoring ASCAP's user-related services** and, based on its misconception of the point as a claim for tying, rejected the significance of the sanctions

*There can be no question but that those sanctions are sufficiently strong, in and of themselves, to preclude departures from the system by members or networks. Professor Steiner admitted precisely that when he testified that a desire to avoid unnecessary transactional costs is what has forced the members and networks to "reveal a preference" for blanket licenses instead of a direct-licensing bypass (Tr. 4436-36a). The substance of Mr. Nathan's testimony on this subject was identical (Tr. 3989-90) as was BMI's post-trial brief (JA 554-55). ASCAP also has consistently taken this position (*see, e.g.,* ASCAP's reference to "the great convenience and economic advantage" of blanket terms, in its reply memorandum of September 3, 1971, on the motion for summary judgment, JA 187; ASCAP's trial brief, JA 343-44, and ASCAP's post-trial brief, JA 368-69).

**As the court below viewed it, our position was not only exclusively an independent claim for tying, but a claim that what ASCAP tied to CBS's acceptance of a blanket license was ASCAP *member*-related services:

> "CBS points out that ASCAP and BMI offer their members the services of monitoring and policing music uses and collec-

imposed on members on the ground that they did not independently give rise to a cause of action by CBS:

> "The claim that ASCAP and BMI condition the sale to their members and affiliates of their services as licensing agents on their 'purchase' (through administrative charges against royalty distributions) of auxiliary services such as monitoring is also without merit. CBS has no standing to assert such a claim because the member or affiliate, rather than CBS, is the alleged victim of the tie." *Ibid.*

That passage is significant not merely because it displays the court's misunderstanding that it had been asked to rule on whether ASCAP's withholding of *member*-related services was a tie-in imposed on CBS; it more importantly exhibits a critical failure to appreciate that being made "victim" of such withholding might just add to a *member's* already strong antipathy to spending his own money for the creation of direct-licensing facilities that would cast him in that "victim" role.

To be sure, the court noted that publishers and writers "do not *indispensably* need ASCAP or BMI to perform the function of collecting their royalties" (400 F. Supp. at 781-82 n. 23, JA 628-29) (emphasis added). It is also true that they do not "indispensably" need ASCAP or BMI to perform any other of the auxiliary services. All are "physically possible" without ASCAP or BMI; and that fact has nothing whatever to do with the issue. The services withheld from direct-licensing members are indisputably impor-

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tion and distribution of royalties, and claims that neither organization offers such services to any user of music, such as CBS '*unless* the user accepts a blanket license . . .' CBS cannot have been the victim of a tie-in because it has never purchased such services; only members and affiliates of ASCAP and BMI have done so." 400 F. Supp. at 781, n. 23, JA 628. (Emphasis in original.)

No wonder the court thought the claim "puzzling" (*ibid.*).

tant to those members; the fact that they are not available in direct licensing is indisputably a sanction on that activity; the imposition of such a sanction indisputably constitutes another barrier to a bypass. That's the point which the court below missed.

Finally, the court erroneously found that

> ". . . there is no evidence that ASCAP and BMI have refused or would refuse to monitor uses and collect royalties on behalf of members and affiliates who engaged in direct negotiations." 400 F. Supp. at 781 n. 23, JA 628.

That ASCAP has in fact so "refused" is evidenced graphically on this record by the 3M incident. In that episode, ASCAP flatly refused to monitor or police for members who directly licensed 3M (Finkelstein Tr. 3781-94; Chiantia D 291-94). Indeed, the ASCAP and BMI post-trial briefs, as well as the lower court opinion itself, actually emphasized that that refusal was the major reason for the publishers' disinclination to deal with 3M (JA 422; ASCAP Post-Trial Br. 63, n.; 400 F. Supp. at 773-74, JA 620-21).*

But when the court below found that there was "no evidence" that ASCAP "*would* refuse" to extend its auxiliary services in a system in which uses were licensed individually and on a direct basis, the court not only plainly erred in its view of the evidence but overlooked the very existence of the case.

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*ASCAP's justification for cutting off direct-licensing members from the economic advantages of common policing and monitoring is right out of "Catch 22." When pressed to justify that policy, ASCAP's general counsel, Mr. Finkelstein, responded that since the consent decree prohibits ASCAP from interferring with the members' "right" to directly license, ASCAP dare not get involved (Tr. 3786-88, 3793-94). In other words, so as purportedly not to restrict the members' "right" to directly license, ASCAP denied its members who wished to do so access to a more efficient system of common monitoring and policing.

CBS's complaint in this suit seeks relief that will generate such a system. The fact that ASCAP "would refuse" and has refused to extend its auxiliary services in aid of the direct licensing that would occur in that system could not be demonstrated any more sharply than by the literal outrage ASCAP expressed at the thought that it continue common monitoring, policing and other such services under that system:

> "The last aspect of the 'per-use' license that has thus far been revealed is the 'administrative fee.' No one yet knows, in precise detail, what it means, but it is perhaps the ultimate chutzpah in the CBS proposal. *CBS' notion, apparently, is that ASCAP* —although its 'per-use license' will be used only as a last resort—*will exist to service the direct licensing which CBS envisages between CBS' producers and ASCAP's members.* CBS proposes to require ASCAP to monitor all performances, record them in its computers, compute charges, send out bills and make payments. In return for this service, CBS would pay ASCAP some 'administrative fee.' CBS apparently intends to spend days of testimony in demonstrating that ASCAP's computers could perform these services. *There might be greater difficulty, we suggest, in finding a man willing to be president of ASCAP and accept the 'administrative fee.'*" (JA 346-47) (Emphasis added.)*

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*It should also be noted that, contrary to being the "ultimate chutzpah", it is, indeed, the *minimum* requirement of the antitrust laws, under the teaching of such cases as *Associated Press* v. *United States*, 326 U. S. 1 (1945); *United States* v. *Terminal Railroad Ass'n*, 224 U. S. 383 (1912); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F. 2d 484 (1st Cir.), *cert. denied*, 344 U. S. 817 (1952); and *Silver* v. *N. Y. Stock Exchange*, 373 U. S. 341 (1963), that if ASCAP is allowed to continue even temporarily in this field, it must limit the restraint potential inherent in its combinative structure to the minimum extent necessary—which means, in this instance, to license on a use-by-use basis.

In short, ASCAP offers no reason why it could not continue to provide such auxiliary services, for a fee, divorced from its performance of a licensing function (or with its performance, as in the per-use system, of a diminished licensing function); it simply says that it won't. And that is precisely the point.

C. Burden of Proof.

The court below held that it was CBS's burden to prove the "non-viability" of the bypass alternative in order to establish that defendants' price-fixing was a restraint of trade (400 F. Supp. at 749-51, JA 596-98). The irrelevancy of the bypass alternative in law (Point I) and its inutility in fact (Point II. B.) should render the question of burden of proof academic.

Nevertheless, if buyer-alternatives to a price-fix were relevant to a determination of whether price-fixing were a restraint, it would clearly be the defendants' burden to establish that buyers could avail themselves of such alternatives without competitive disadvantage or other loss. *See TV Signal Co. of Aberdeen* v. *American Telephone & Telegraph Co.*, 462 F. 2d 1256 (8th Cir. 1972); *Advance Business Systems & Supply Co.* v. *SCM Corp.*, 415 F. 2d 55, 62 (4th Cir. 1969), *cert. denied*, 397 U. S. 920 (1970); *Bergen Drug Co., Inc.* v. *Parke, Davis & Co.*, 307 F. 2d 725, 728 (3rd Cir. 1962); *Allied Electric Supply Co.* v. *Motorola, Inc.*, 369 F. Supp. 133 (W. D. Pa. 1973).

The court below attempted to distinguish *TV Signal, supra,* on the ground that the restraint in that case (a boycott) was apparent irrespective of buyer-alternatives, but in this case, nonexistent unless buyer-alternatives were proven to be not "viable". Since there is no more reason to conclude that a price-fix is vitiated by an alternative means of buying the product than there is for believing a boycott relieved by the availability of substitute products, that ruling by the court below was erroneous.

In terms of antitrust policy, it is difficult to imagine a rule more discouraging of the institution of private claims against price-fixing *or* boycotting than one compelling the plaintiff to assume the burden of demonstrating the inutility of every alternative with which he was allegedly presented to avoid yielding to the defendants' restrictive terms.

POINT III

THE PER-PROGRAM LICENSE, SUGGESTED BY THE COURT BELOW AS ANOTHER ALTERNATIVE TO ACCEPTANCE OF THE ASCAP FIXED PRICE, ALSO IMPOSES A FIXED PRICE AS WELL AS OTHER ANTI-COMPETITIVE TERMS.

The court below held that the ASCAP and BMI per-program licenses could be offered in a way to cure any antitrust problems; but what the court described was not a per-program license—it was the per-use license sought (as alternative relief) in this suit—and the restraints actually imposed by a per-program license were nowhere mentioned in the opinion.

Under a per-program agreement, the user receives a license of exactly the same scope as that provided by the blanket arrangement: the right to use any, some or all of the music in the ASCAP pool. The difference between the two forms of license lies in the method of payment. Instead of paying a fee for the year, the user pays either ("at the option of ASCAP") a flat dollar fee or percentage of time income for each program using any ASCAP music.*

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*The basic format of the per-program license is derived from Paragraph VII(B)(1) of the 1950 consent decree which directs ASCAP

> ". . . to issue to any unlicensed radio or television broadcaster, upon written request, per-program licenses, the fee for which
>
> (1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a per-

Thus, ASCAP's licensing on a per-program basis is price-fixing for the same reason that its licensing on a blanket basis is price-fixing. In both cases, music publishing corporations and writers do not compete on a price basis but sell on prices and terms established by a Board which they have elected for that purpose.

Also, while a per-program license could be constructed to enable the user to escape paying ASCAP a per-program fee for programs as to which *all* the ASCAP music used has been directly licensed,* it *cannot* be fashioned to per-

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centage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster, . . ." (E 131)

It might be noted that the royalty rate of a per-program license will necessarily be higher than the blanket rate. To offer the two licenses at the same rate would simply eliminate the blanket license, since, in that event, the broadcast user would always accept the per-program license, pay nothing on programs using no ASCAP music, and thus automatically reduce its fees (even though its total usage of ASCAP music remained constant).

For that and other reasons, ASCAP has insisted upon, and historically obtained, per-program rates four and one-half times those of the blanket rates (E 5 (para. 11), 285, 354); and ASCAP believes that ratio to be justifiable in relation to a television network (Fagan D 524-29). In fact, ASCAP claims to have lost money on the few per-program licenses it has issued, despite royalty rates of four and one-half times that of the blanket figure (Finkelstein Tr. 3617; Fagan D 467, 526-27).

*The BMI per-program license cannot permit such escape because BMI possesses the exclusive right to license the music in its pool (JA 65, para. 5; E 578 (para. III A), 583 (para. III A), 588 (para. 4(a)).

The only per-program license ever issued by ASCAP in the television field was that offered to television stations in the mid-1950's (initially accepted by several and presently held by none) (E 335; Marks Tr. 2435). In addition to the "all-or-nothing" provision referred to above, it so hedged and conditioned the direct-licensing escape clause with unnecessary restrictions as to make direct-licensing impossible. There is no need here to review those additional restrictions. We agree with the court below that they could be removed in consent decree proceedings, although ASCAP would predictably oppose any such change (*see* JA 396; Fagan D 530-32) and the proceedings to achieve it would be prolonged and costly. But we may pass that point because the structural elements of the license—restrictions that cannot be removed (*i.e.*, without granting the relief sought in this suit)—are sufficient in themselves to demonstrate its illegality.

mit such an escape for programs as to which *less than all* of the ASCAP music used is directly licensed. In other words, the form of the license imposes an "all-or-nothing" obstacle course to the direct-licensing possibility.

If ASCAP's per-program fee were reduced for each program to take account of the nature and quantity of uses for which the producer obtained direct licenses,* then the per-program fee payable to ASCAP would, of course, be limited to, and vary with, the nature and quantity of the uses for which no such direct licenses had been obtained. And if the fee were made to vary in accordance with the nature and quantity of non-directly-licensed uses, then the ASCAP license providing for such variance would no longer be a per-program license, but a per-use license. That, of course, is the very form of license sought in this case (in the alternative and as a transitional measure—*see* note at 39, *supra*).

Furthermore, the per-program license would effectively discourage the use of both ASCAP and BMI music on any single program and is thus patently anti-competitive in this sense alone.

Once an ASCAP composition is selected, the incremental cost to the producer of using additional ASCAP compositions would be zero (Steiner Tr. 4444-45). If the

*We speak of direct licensing by producers rather than by CBS, since, if direct licensing could actually occur, it would make far more sense economically and logistically for producers to perform that function—in the same fashion that they now supply, for a package price, all other programming elements (E 10; Sipes Tr. 22; Wright Tr. 403-04; Vincent Tr. 583; Sunga Tr. 737-38). It is the producers who select the music, are more intimately acquainted with the program's needs and can make appropriate trade-offs between music and other program elements in order to meet their budgets (Wright Tr. 454-55, 460-61; Vincent Tr. 627-33; Sunga Tr. 758-59). And, in a per-use or fully injunctive system, the package price would of course, include music performance rights as a budgeted item (Sipes Tr. 65-67; Wright Tr. 408-20, 435-36; Vincent Tr. 584-98; Sunga Tr. 738-51). The assumption, however, that *either* producers or CBS could engage in direct licensing under the per-program format is unreal for the reasons discussed below.

producer would like to use a BMI composition as well, under a BMI per-program license, the consequence of so doing would be to double his music expense for the program (and, at per-program rates of four and one-half or even two times the blanket rate, that penalty would obviously be substantial). There might be occasions when the requirements of a particular program would necessitate the payment of this form of tribute. Approximately 70% of CBS's programs now, in fact, use both ASCAP and BMI music (PX's 836-37). But the disincentive to do so under a per-program system is self-evident. (Fisher Tr. 1712-14; Finkelstein Tr. 3769-70; Nathan Tr. 4011-13, 4018-19; Steiner Tr. 4444-46).

The court below considered neither these structural elements of the per-program license nor their anti-competitive effects. In reaching its principal ruling in this area, the court found:

> (a) that the vast percentage of CBS's entertainment programs did not contain " 'outside' published music" but only music written for the program—and that, for such programs, the music could be licensed directly "without difficulty," the per-program fee escaped, and access to a competitive market obtained (400 F. Supp. at 778); and
>
> (b) only "a very small portion" of CBS's programs used "outside" published music (for which there was no direct-licensing machinery) so that, for those programs, a per-program license "could be a logical alternative" (*ibid.*).

Presumably, the court's conclusion was (since no other is apparent) that the anti-competitive impact of the per-program format was without legal significance because it would apply to only a "very small portion" of the CBS programs. If so, the conclusion is wrong in fact and law; and egregiously so in both.

First, while music written for the program is transactionally accessible to program producers, that fact hardly means that the price of such transactions would be at competitive market equilibrium levels. In fact, the "all-or-nothing" provision of the per-program license would ensure just the reverse by creating a price-inflationary effect over and above the price reference point (now $1,000 a feature use) at which ASCAP would be effectively selling to other networks (Fisher Tr. 1717-18, 1723-24). Dr. Fagan, ASCAP's Chief Economist, admitted that price-inflationary effect in the most explicit terms (D 538-39). And it is evident why.

Under a per-program system, the producer would be committed in advance to pay ASCAP $5,000 or 9% (or whatever the per-program rate is) for each program using ASCAP music, or double that amount if he wanted to use both ASCAP and BMI compositions. He could not reduce that fee by using less music or by jumping one or several obstacles of the per-program license itself (*i.e.,* by directly licensing one or several songs). He could only attempt to avoid the entire per-program fee; but to do that he would have to license *all* music directly—"outside" published music *and* music written for the program. Each writer and publisher from whom he sought the means to avoid that full $5,000 or 9% fee commitment would therefore be handed artificial leverage (Fisher Tr. 1715-18).

Every publisher and writer approached would obviously be aware of that factor (Fisher Tr. 1717-18, 1723-24; Fagan D 538-39). Each might use it differently, depending upon his assessment of the strength of his composition; but randomized over thousands of transactions a year, that factor would inevitably inflate prices.

Thus, even assuming that packagers would attempt to surmount these hurdles program at a time, and actually succeed in meeting the all-or-nothing requirement for some appreciable portion of their programs, the bargain struck

in these transactions would not be at competitive prices (Fisher Tr. 1717-18), but at prices "tampered with" by the combination's restrictive terms. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940).

Second, the only way that the court could have found that the vast percentage of CBS's programs use only music written for the program is by adopting ASCAP's method of computing that percentage—*i.e.,* by counting each of the hundreds of one-minute to five-minute news inserts or children's educational programs as a separate "program" equal in value to a one-hour variety program or a two-hour movie (*see* Addendum D). Moreover, since the ASCAP statistic derived by those means ("perhaps 90-95%" of CBS programs—ASCAP Post-Trial Brief 78) was based on the ASCAP music study (AX 287), it is limited to ASCAP music. Thus, in computing the percentage of programs using published music, ASCAP (and, by adoption, the court) simply eliminated from that category all programs whose published music consists of BMI compositions.

In short, ASCAP put forth a number based on a statistical stunt and the court below not only adopted the conclusion without recognizing the fallacy, but based its central ruling of law upon it.

Third, that legal conclusion would be wrong even if the underlying arithmetic were sensible (and the price-inflationary effect were assumed, *arguendo,* away). For it would mean that the many thousands of transactions, AGAC-writer consents and publisher contacts that the ASCAP music study itself discloses would have to be made in order for CBS and program producers to directly license ASCAP published music (Addendum D at 5-8) would be confined to that "very small portion" of CBS programs. All the more obvious, then, would be the fact, already implicit in the lower court's position, that at the very minimum, *those* programs

could not successfully hurdle the per-program obstacle course.

Thus, if the producer of the Captain Kangaroo show (to use an example cited by the lower court) were to accept per-program terms, as the lower court suggested, he would be effectively barred by its all-or-nothing feature from licensing directly the very music that the court emphasizes is so accessible to him, *i.e.*, the music written specially for the program. He could not, in fact, deal directly with even his own staff writers.

As a matter of law, then, the argument defeats itself. A restraint on competition among sellers need not apply to all of the buyer's purchases (or, in this case, programs) in order to constitute a restraint actionable under Section 1. *United States* v. *Loew's Inc.,* 371 U. S. 38, 47-50 (1962). And as the Fourth Circuit stated in *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d 832, 838 (4th Cir. 1960), *cert. denied,* 366 U. S. 963 (1961), "it is the restrictive nature of the agreement, not the fact of exclusivity, which is objectionable."*

In point of fact, whether the use of published music is confined to approximately 10% of all CBS programs as the court suggests (obviously, a not inappreciable number) or 50%, those uses account for the great preponderance of the fees now paid and are, therefore, the most significant in terms of measuring the substantiality of the restraint. Published music now generates between 70% and 80% of the ASCAP credits (*see* AX's 159, 160(a)-(q), 287). That means that between 70% and 80% of the fees CBS pays ASCAP were effectively paid for those uses. If those uses were actually limited to less than 10% of the programs, the per-program format would still preclude any

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*It might also be noted, though unnecessary to the result, that the per-program license structure is substantively identical in effect to the block-booking practice condemned in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 156-59 (1948).

form of price competition as to the majority of CBS's purchases.

To be sure, the court below attempted to deal with the all-or-nothing provision of the per-program license which is the root cause of so many of its antitrust problems. The court's suggestion was that CBS bargain with ASCAP

> "for a license which gave it 'credit' (i.e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question." 400 F. Supp. at 779, JA 626.

—or failing that

> "because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions, [*] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program." *Ibid.*

Although ambiguous, the suggestion is susceptible of only two interpretations. On its face, it would appear to mean that the per-program license that CBS should obtain is one that gives it a dollar-for-dollar deduction from the per-program fee for the amounts spent in directly licensing music for each program. If so, the suggestion posits a license which, apart from its other legal infirmities, would provide no economic incentive for any direct licensing at all. Why would any producer incur the transactional expenses of direct licensing when he could not reduce the

*The BMI decree contains no such provision. The court simply misstated the fact.

amount he was already committed to pay but, at most, take his (or CBS's) money out of ASCAP's pocket and put it into the publisher's. While that interpretation of the suggestion would make it absurd, the only possible alternative construction actually reconfirms the central error of the opinion below.

Under this interpretation, the suggestion would be that CBS is entitled to obtain from ASCAP a form of license under which payments would vary with the nature and quantity of use, and would not have to be paid with respect to directly licensed performances. Indeed, the court's second verbalization of this suggestion (in its "Summary of Findings") seems to bear that interpretation out:

> "[CBS] could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing that, it could bring proceedings under the consent decree." 400 F. Supp. at 780, JA 627.

As discussed above, however, such a license is *not* a per-program license at all, but the very per-use license sought (as alternative relief) in this lawsuit. If it were actually available under the ASCAP decree, as the court below maintains, the only ground for obtaining it would be, as the court notes, "because the decree enjoin[s] ASCAP . . . from interfering with the direct licensing of compositions" (400 F. Supp. at 779, JA 626). But if the ASCAP system interferes with direct licensing—*i.e.*, with CBS's access to a competitive market—then the ASCAP combination is certainly violating the antitrust laws. And if ASCAP is violating the antitrust laws, then the decision appealed from certainly should have gone the other way.

Plainly, there is no rule of antitrust law or general jurisprudence that requires a non-signatory to a consent decree to exhaust supposed consent decree remedies before

bringing the sort of independent action explicitly made available to a private party under Section 16 of the Clayton Act.

But the court's suggestion is particularly misconceived in view of the fact that the 1950 consent decree does not compel ASCAP to grant licenses under which fees vary with use (*i.e.*, per-use licenses); and if the consent decree does not compel it, it is not, under this Court's decisions in *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F. 2d 117 (2d. Cir.), *cert. denied*, 377 U. S. 997 (1964) and *United States* v. *ASCAP (Metromedia, Inc.)*, 341 F. 2d 1003 (2d Cir.), *cert. denied*, 382 U. S. 877 (1965), available in consent decree proceedings. Indeed, what this Court also held in *Shenandoah* was that any commission by ASCAP of antitrust violations was independently actionable irrespective of the decree—a ruling that highlights the error in the district court decision here. For the net effect of that decision was that ASCAP's inter-ference with direct licensing and hence (logically) its viola-tion of Section 1 was remediable by what amounts to per-use terms, which the consent decree does not in fact offer and which the district court refused to grant.

POINT IV

DEFENDANTS ARE GUILTY OF MONOPOLIZATION IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT.

A. Elements of Monopolization.

Section 2 of the Sherman Act makes it illegal for any person to

> ". . . monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states. . . ."

The offense of monopolization was held by the Supreme Court in *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570-71 (1966), to consist of

> ". . . two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

The classic test for defining markets under Section 2 was set forth by the Supreme Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377, 395(1956):

> ". . . commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce' monopolization of which may be illegal."

And the test for determining whether such reasonable interchangeability among products exists is based on

> ". . . the responsiveness of the sales of one product [or service] to price changes of the other. If a slight decrease in the price of [defendant's product or service] causes a considerable number of customers of other [products or services] to switch to [defendant's product or service], it would be an indication that a high cross-elasticity of demand exists between them; that the products [or services] compete in the same market." *Id.* at 400.

Thus, in *Grinnell,* central-office property protection services (burglar and fire alarm systems) which were "accredited" by insurance companies, and hence enabled their subscribers to obtain lower insurance rates, were found *not* to

be reasonably interchangeable with "non-accredited" services and, therefore, to comprise a separate market. Similarly, in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 426 (2d Cir. 1945), domestic aluminum was held by this Court (per Learned Hand, J.) to constitute a market separate and distinct from foreign aluminum or domestic copper and steel.

B. Defendants' Willful Acquisition of Monopoly Power.

If defendants possess monopoly power in their dealings with networks, their maintenance of it is certainly "willful", since it is perpetuated by combinations for which there is no market-functioning necessity and which, therefore, is not "thrust upon" them.*

That the ASCAP and BMI combinations do in fact possess such power and are therefore guilty of monopolization we believe to be ineluctable conclusions on the record of this case.

Each, of course, is a common-sales agency. The performance rights comprising both agencies' pools would obviously be competitive and thus occupy the same market if sold individually; but they are not sold individually. The

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*The element of "willfulness" (or, as it is sometimes referred to, "deliberateness") should be distinguished, for purposes of analysis, from the "specific intent" required to establish an attempt to monopolize claim. All that need be proven for a monopolization finding is "general intent"—*i.e.*, that the defendant intended *to act,* from which it is presumed that it intended the natural consequences of that act. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 432 (2d Cir. 1945). Accordingly, when a defendant is shown to have achieved monopoly power, its "general" intention to do so is presumed. *du Pont, supra,* 351 U. S. at 392.

That presumption may be rebutted by showing that such power is "a consequence of a superior product, business acumen, or historic accident" (*Grinnell, supra,* 384 U. S. at 571) or, in a combination case, has been "thrust upon" the defendant by the inability of the market to function in its absence (*see United States* v. *Terminal Railroad, Ass'n.,* 224 U. S. 383 (1912)). Clearly, neither of these contentions is available on this record to the ASCAP or BMI combinations.

only thing sold by each agency is a blanket license to its entire pool; and the only way a network could avoid taking that license and attempt to obtain rights individually is by coming into collision with the barriers to a bypass discussed in Point II.B., above.

In the light of those barriers, "slight changes" in the price of an ASCAP blanket license will certainly not lead a television network to attempt a bypass (*i.e.,* in the language of the *du Pont* decision, "to switch to" individual performance rights obtained on a direct-licensing basis). It is equally clear that "slight changes" in the price of an ASCAP blanket license will not induce a television network "to switch to" a BMI blanket license—the network indisputably needs both (JA 41-42 (para 15), 68-69 (para 15); E 6 (para's 13-15) 646, PX 509 (para's 11-13); Fisher Tr. 1747-51; Nathan Tr. 4205-06; Adams D 27-28).

From the network-buyer's standpoint, therefore, ASCAP and BMI blanket licenses are not "reasonably interchangeable" with each other, nor is either "reasonably interchangeable" with direct licenses to the separate copyrights in the pool.* In consequence, defendant combinations have bifurcated what would otherwise be a single market consisting of individual performance rights into two separate markets, each consisting of a blanket license to approximately half of those rights.**

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*BMI's exclusive rights, of course, preclude such interchangeability apart from the barriers that would exist in the absence of such exclusivity (JA 65, para. 5; E 578 (para. III A), 583 (para. III A), 588 (para. 4(a))).

**Even if it were assumed, contrary to fact and law, that music performance rights constituted a single market, it would still be necessary to conclude that the market had been monopolized by the major music publishers. It is a stipulated fact that "virtually all major ASCAP publishers own or are owned by corporations which are affiliates of BMI" (E 6, para. 17). Mr. Cramer testified:

> "Most leading publishers have affiliation with both ASCAP and BMI. It is hard to think of one that doesn't have publishing interests in both camps." (Tr. 4282)

(footnote continued on next page)

Moreover, just as those markets are defined by the barriers between a blanket license and a bypass, the combinations' monopoly power in those markets is measured by the height of those barriers (*i.e.*, the degree of the disadvantages the networks would sustain by attempting to surmount them).

That analysis is certainly not unique to this case. A seller's monopoly power is always measured by the disadvantages to the buyer of attempting to bypass the monopolist—*i.e.*, by purchasing an alternative product or service or, in the case of a fungible product, by resorting to an alternative source of supply. As the Supreme Court stated in *Associated Press*, quoting with approval from Judge Learned Hand's district court opinion,

> ". . . monopoly is a relative word. If one means by it the possession of something absolutely necessary to the conduct of an activity, there are few except the exclusive possession of some natural resource without which the activity is impossible. Most monopolies, like most patents, give control over only some means of production for which there is a substitute; the possessor enjoys an advantage over his competitors, but he can seldom shut them out altogether; his monopoly is measured by the handicap he can impose." 326 U. S. at 17, n. 17.

But the barriers involved here are far more substantial than those relied on in any prior monopolization case of which we are aware. They are certainly higher than those

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If the major book publishing companies in the United States combined and agreed to market their products through either of two common-sales agencies at prices fixed by those agencies (with the decision left to the author as to which of the two agencies would sell each book), they would clearly have monopolized the book publishing market. Precisely that result has been achieved by the major music publishing companies in this country.

measured in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416 (2d Cir. 1945) by the delivery cost of importing aluminum from overseas; in *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.* 194 F. 2d 484 (1st Cir.), *cert. denied,* 344 U. S. 817 (1952), by the cost of locating a business next door; or in *Associated Press* v. *United States,* 326 U. S. 1 (1945) by the competitive disadvantage of using UP and INS news rather than the AP service.

Thus, in this case, the barriers to a bypass *both* place the blanket license in a separate market from individual performance rights *and* confer monopoly power on each common-sales agency that purveys a blanket license.

The fundamental error of the court below in dealing with the monopolization issue was the following major premise of its market definition conclusion:

> "a bundle of direct licenses for network performances, acquired on an individual transaction basis, is interchangeable with a blanket license." 400 F. Supp. at 782, JA 629.

Only by ignoring the disadvantages the buyers would incur in attempting to substitute "licenses acquired on an individual transaction basis" for a blanket license could one conclude that the two were "interchangeable". But assessing the strength of precisely such disadvantages (measuring "the handicap" the combination "can impose," *Associated Press, supra,* 326 U. S. at 17, n. 17) is what Section 2 litigation is all about.*

The court also held on the market definition issue,

> "ASCAP and BMI . . . are merely the sole source of the blanket licenses which CBS does not want.

*Indeed, if the barriers to bypassing a seller (or seller combination) were not assessed in that fashion, the only seller that could be held guilty of monopolization under Section 2 would be one possessing the *sole* source of supply—*i.e.,* a total monopolist. That the

> A market whose only product that CBS does not want to purchase cannot by definition, be a relevant market . . . ." 400 F. Supp. at 782, JA 629.

That reasoning, if generally adopted, would obliterate Section 2. No buyer ever "wants" to deal with a seller (or, particularly, with a combination of sellers) who possesses monopoly power. He does so only because of the disadvantages of obtaining the product by another means (or the relative undesirability of substitute products). If "relevant markets" were generally defined to exclude the seller whose products or service buyers did not "want" in that sense (which is the only rational sense in which the word could have been used by the court below), then Alcoa's aluminum, for example, would be excluded from the very market which, in the actual decision on point, Alcoa was held to have monopolized.

It may well be that what the court intended to imply was that a blanket license could not comprise a separate market because it represents only the *means* of obtaining the underlying product—individual performance rights (which, in the court's view, are "fungible" (400 F. Supp. at 783, JA 630)). Whatever one's view of the fungibility of music compositions, however, it is obvious that performance rights are not as "fungible" as aluminum. From the buyer's standpoint, therefore, buying aluminum from foreign suppliers was simply another *means* of buying a fungible product. And there is certainly far more basis for holding a blanket license non-interchangeable with a bypass than

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court below fell into that error is demonstrated by the court's ruling that monopolization could not be shown unless it were proven that ASCAP and BMI "blanket licenses are the *sole* method for securing performance rights" (400 F. Supp. at 782, JA 629) (emphasis added). But total monopolists rarely, if ever, exist outside of economic textbook models, and total monopoly is certainly not the test for a Section 2 violation as the Supreme Court's statement in *Associated Press* made clear.

there was in holding Alcoa's aluminum non-interchangeable with aluminum from abroad.

Finally, with respect to monopoly power, the court below "noted" that "the power of ASCAP and BMI to control the price even of their own blanket or per-program licenses is sharply curtailed under the decrees" (400 F. Supp. at 783, JA 630). Whether it is "curtailed" at all, let alone "sharply," is a debatable proposition; but what is perfectly clear is that neither organization's monopoly power is eliminated by its decree.

The BMI decree, of course, does not even contain provisions for rate-making proceedings (E 1568). Hence, the power of that combination to increase prices is limited only by the right of a user to institute an antitrust suit against it—a procedure which in prospect neither eliminates monopoly power nor would even continue to exist if the lower court's ruling in this case were affirmed.

ASCAP, as a result of its consent decree, may not be a total monopolist; but it is well-settled that control over price, for Section 2 purposes, does not mean the power to raise price to the total monopolist's profit-maximization point. It is sufficient if the "handicap" the seller "can impose" (*Associated Press* v. *United States,* 326 U. S. 1, 17, n. 17 (1945)) enables the seller to raise price above what would be competitive market levels and without concern for the prices of other products or services.

The simplest confirmation that ASCAP possesses such power is the testimony of ASCAP's President, defendant Stanley Adams, that, in determining the fees to charge broadcasters for an ASCAP license, ASCAP does not take into account what BMI is charging (D 27-28; *see* E 533; Fagan D 471-73, 488-89). In fact, ASCAP's Chief Economist, Dr. Fagan, readily admitted the conclusion of monopoly power itself (D 410; *also see* Brettler D 201).

Moreover, in terms of ASCAP's ability to raise price above competitive market levels, it is plain that the possibility (historically unutilized) of a judicial rate-making trial constrains ASCAP no more than, if even as much as, the alternative sources of supply available in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) and *United States* v. *Grinnell Corp.*, 384 U. S. 563 (1966). The opportunity of litigating the "reasonableness" of cartel rates is no substitute to the user for the price-paring dynamics of a competitive marketplace; and the actual inflationary impact on price of the blanket licensing system has been established on this record as a matter of fact (E 5 (para. 10), 124, 533, 561; Fisher Tr. 1664-70, 1737-40; Nathan Tr. 3876-77, 3946, 3984-85; Chiantia Tr. 2952; Finkelstein Tr. 3595; Addendum A).

Furthermore, judicial relief is always available against combinations which have monopolized and fixed prices. By prosecuting a Section 2 claim, the victim of such monopolization can always eliminate the combination's power over price. This is precisely such an action. The fact that the victim can also pursue a consent decree remedy for a non-competitive, but theoretically "reasonable" fee no more precludes a finding of the monopolist's power over price than does the availability of Section 2 litigation.

Conclusion

In sum, the plain fact that defendants are fixing prices requires a reversal of the opinion below as a matter of law. If buyer-alternatives to acceptance of that fixed price were deemed relevant, the findings of the court below regarding the disadvantages of the alternatives here, particularly as supplemented by defendants' admissions and other uncontradicted proof (as to which the court made no findings), would be more than sufficient to support the price-fixing

conclusion. Moreover, those disadvantages, which amount to barriers to a bypass of the ASCAP and BMI combinations, establish the combinations' monopolization in violation of Section 2.

For the foregoing reasons, the order appealed from should be reversed with costs and the district court directed to issue an order adjudging defendants and defendant-classes to have violated Sections 1 and 2 of the Sherman Act and to have misused the copyrights in their pools.

February 13, 1976

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff-Appellant, -against- AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*, Defendants-Appellees.	Docket No. 75-7600 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

The undersigned, being duly sworn, deposes and says: Deponent is over the age of 18 years, is not a party to this action and resides at 64-42 84th Street, Rego Park, N.Y. 11374

On the 3rd day of June 1976 deponent served the annexed Brief, Reply Brief and Addenda A-E to Brief for Plaintiff-Appellant (Two Copies of Each) upon (each of) the below listed attorney(s) by depositing a true copy (copies) of the same securely enclosed in a postpaid, properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

SEE ATTACHED LIST

Sworn to before me this 3rd)
day of June 1976)

John Murphy

JOHN MURPHY
Notary Public, State of New York
No. 03-8071585
Qualified in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1978

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